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PRINCIPLES  
OF THE  
CONSTITUTIONAL LAW  
OF THE  
UNITED STATES

BY  
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## PREFACE

This volume is an abridgment of the author's larger treatise in two volumes, published in 1910 under the title *The Constitutional Law of the United States*. The aim has been to present the general principles of our constitutional jurisprudence in a form suitable for class-room use. In pursuance of this aim care has been taken to cite those cases which not only support the positions stated in the text but which will best repay individual examination and study by the student. In particular the effort has been made to suggest, and in a measure to discuss, the unsettled questions of our Federal jurisprudence. The necessary limits of space have prevented in many instances an adequate presentation of the arguments supporting the doctrines stated, but, from a pedagogic point of view this may be a merit rather than a defect, for it will furnish opportunity for a presentation by the students of the court's reasoning as gained by a reading of the cases, and a criticism by the instructor of the reasoning as thus presented.

For the convenience of both the instructor and the student reference is made in all cases to the Supreme Court Reporter and to the Lawyers' Co-operative Edition, as well as to the official reports of the Supreme Court of the United States.

The author is under great obligation to Mr. J. Wallace Bryan of the Maryland Bar for his aid in reading the proof of this volume.





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# PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES

## CHAPTER I

### INTRODUCTORY—PRELIMINARY DEFINITIONS

The constitutional jurisprudence of the United States is an especially complicated one, and its principles proportionately difficult of exposition and comprehension. This complexity is in the main due to the Federal character of our governmental system. A prerequisite to an accurate understanding of American public law is, therefore, a knowledge of the juristic nature of the Federal form of political organization, and this in turn necessitates an explanation of certain terms such as "State," "Government," "Sovereignty," and "Constitutional Law." The definition of this last term will be found especially necessary in order that its American usage may be distinguished from that in the other countries of the world.

#### **State and government distinguished ·**

An aggregate of individuals living together and united by mutual social and economic interests is termed a Society. A Society viewed as a politically organized group is termed a Body-Politic or State. The complexus of organs or agencies through which the State performs its functions are termed its Government. The persons who operate this political machinery are collectively known as

the Magistracy. The commands and directions issued by the State and enforced through its government by those in official authority are known as Laws. These laws are divisible into public and private, the former including as sub-classes, constitutional and international law. Political theorists and jurists are not agreed as to whether, strictly speaking, the rules regulating the relations of States to one another should be termed laws. This, however, is a question which it is not necessary here to discuss.

Constitutionally viewed, the State appears as an entity or corporate person possessing the supreme legal will, or, as this supreme legal will is termed, the Sovereignty. The State is thus the ultimate source of law for all persons subject to its authority. These persons include all those who owe direct fealty or allegiance to the State, and known as citizens or subjects, as well as all citizens or subjects of other States, known as aliens, who are temporarily or permanently within the territorial limits of the State.

In every politically organized community entitled to be termed a State there exists, then, an authority to which, from the legal point of view, all interests are potentially subject. In the entire body of laws, public and private, as they exist at any one time, is stated the supreme will of the State so far as it has found expression. Because supreme, and the sole source of law, the only legal limits to this will are those which are self-set. These self-set limitations exist in the form of constitutional provisions determining the manner in which the State's sovereign will shall be expressed and enforced. In other words, these constitutional or fundamental provisions provide for the governmental organization of the State and delimit its powers. The government, therefore, as distinguished from the State, exercises the sovereignty, but does not possess it. Instead of being itself the ultimate source of legal authority, its agents may legally exercise



only those powers recognized by existing constitutional law. Where, as in a State autocratically organized, few or no legal limitations upon the official authority of the autocrat or of his appointees and advisers exist, the government has, of course, practically uncontrolled legal power. In modern constitutional States, however, the governments are not only without legal authority with reference to many matters, but are obliged to exercise the authority which they do possess according to definitely determined modes of procedure. It is to be repeated, however, that the domain of the legal and political interests of the individual is simply that which, under existing laws, neither public nor private persons may legally enter. From the possible control of the State, however, through the enactment of new constitutional or statutory laws these liberties are not and cannot be exempt. Professor Burgess has put this very clearly when he says: "The individual is defended in this sphere against the government by the power that makes and maintains and can destroy the government; and by the same power, through the government, against any encroachments from any quarter. Against that power itself, however, he has no defence."<sup>1</sup>

This characteristic of legal omnipotence thus predicated of the State is, of course, not to be construed as carrying with it an actual omnipotence of physical coercive power. The extent to which any given State, or, to speak more accurately, those who express and enforce its will, may control the actions of those subject to their authority is dependent upon manifold conditions of time and place, and especially upon the character and disposition of those to be coerced. All government, as Hume says, rests upon opinion. In every State the very existence of its government, the extent of its powers, and the manner of their

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<sup>1</sup> *Political Science and Comparative Constitutional Law*, I, 176.

exercise, is ultimately dependent upon the acquiescence of the people. This ultimate right of the people means, however, nothing more than that there is a limit to which political oppression and incompetence may safely go. Before this limit is reached—a limit which differs in different States according to the temper and enlightenment of their respective citizen bodies—there is abundant opportunity for grievous oppression and disastrous official incompetence. The fundamental problem of practical politics the world over is thus to secure a form of political organization which will ensure a wise administration of public affairs, and be sufficiently strong and independent to maintain itself against unwarranted attack, and yet be subjected to a control which will furnish a substantial guarantee that the people will not be oppressed. This is the problem of constitutional government, and of constitutional law.

### **The unity and indivisibility of sovereignty**

In the paragraphs which have gone before it has been indicated that, legally viewed, the essential characteristic of a State is the possession by it of a supreme law-determining authority termed Sovereignty. This attribute connotes upon the one hand complete freedom of its possessor from the legal control of any other political authority whatsoever; and, upon the other hand, the right of absolute and exclusive jurisdiction over the legal rights and obligations of those subject to its authority, whether these be considered individually or as grouped into larger or smaller associations of men.

As thus expressing a supreme will sovereignty is necessarily a unity and indivisible. That there cannot be within the same political body two wills, each absolutely supreme, would seem to be sufficiently obvious, and, in fact, the contrary has not often been maintained in direct terms. It has, however, been widely asserted that the

sphere of political authority may be divided into two or more distinct parts, and political organizations established in each which, within their respective fields, may be wholly independent of the control of one another. And this has been, and still is, often spoken of by the Supreme Court of the United States, as well as by other tribunals, as a division of sovereignty and as exemplified in the American constitutional system. The statement is, however, an erroneous one, and due to a confusion between the ideas of State and Government, and to a failure to distinguish between the possession of sovereignty by the State and the exercise by governmental agencies of powers delegated to them by this sovereign authority.

Though the sovereign will of a State may not be divided, it may find expression through several legislative mouth-pieces, and the execution of its commands may be delegated to a variety of governmental agencies. Theoretically, indeed, a State may go to any extent in the delegation of the exercise of its powers, not only to governmental organs of its own creation but to those of other States. In the latter case the State to whose governmental organs the exercise of the powers in question has been delegated acts as the agent of the delegating State, which State retains the legal, if not the actual, power of withdrawing the grants of authority which it has made. Thus England concedes to certain of its colonies, as, for example, Canada and Australia, almost complete authority of government and yet its legal sovereignty over these possessions is in no wise diminished or divided. So, similarly, there have been many instances in which States have placed the administration of certain of their own districts in the hands of other Sovereignities, and in the numerous so-called Protectorates we have instances of weaker and less developed States surrendering the control of their foreign relations and, indeed, certain of their domestic affairs to foreign

nations, without any formal claim of sovereignty over these administered districts or weaker States being asserted by the administering powers.

### **Distinction between Confederacy and Federal State**

Two types of governmental organization which especially illustrate the distinction between the possession of sovereignty and the delegation of the exercise of certain governmental powers are the Confederacy and the Federal State.

In a Confederacy a number of sovereign States create by their joint action a central government as their common agent for the exercise of certain powers, which it is to their interest shall be thus exercised. Each State thus co-operating remains a sovereign body-politic, united only by a treaty or other form of compact with the other States, and not only retains all the political powers not granted to the central government, but remains legally free to withdraw at any time from the Confederacy into which it has entered. Strictly speaking, the term Confederate State is thus a misnomer, for no central State exists but only a central government which acts as the common agent of each of the agreeing States. In a Federal State, upon the other hand, we have a single sovereign political person or entity which vests the exercise of certain of its powers in a central government, and the remaining powers in local governments independent of one another but all acting within their several districts as agents of the central sovereignty, the Federal State. Thus, just as it has been declared to be incorrect to speak of a Confederacy as a State, so here, technically speaking, what exists is a single State, with a governmental machinery consisting of a central organization and a number of local autonomous governing agencies. It is, therefore, more correct to speak of such a State as having a Federal form of govern-

mental organization, than it is to designate it as a Federal State.<sup>2</sup> Whether or not the constitutional units of this federally organized body are entitled to be termed States is a question more important to political theory than it is to constitutional law. Those political philosophers who make sovereignty an essential attribute of statehood are of course obliged to deny to them this title, but the constitutional lawyer is not thus obligated. It is, however, of the utmost importance to the jurist to keep clearly in mind the doctrine that the theory of a divided sovereignty is a false one, and that, conceding the sovereignty of the United States as a National State (regarding which there is now no longer controversy), it necessarily follows that the central government and the state governments do not stand over against one another as co-ordinate powers between whom the powers of public control are divided, but that, fundamentally, the former is supreme, and that, whenever a conflict of authority arises, the final decision and supremacy is with the Federal power itself.

In a Confederacy which is, as we have seen, a league of sovereign States, such coercion as it may be necessary for the central power to apply, may, in certain cases, be directed against the States as such. In a Federal State, however, such as the United States is now agreed to be, the supremacy of the national authority is never maintained by direct action against its member Commonwealths, but is exhibited in its authority to execute its will upon all persons subject to its jurisdiction, anything in the Constitution or laws of any State to the contrary

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<sup>2</sup> Despite the fact that as a matter of strict terminology the terms Government and State are to be distinguished, the use of the expressions "National Government" and "Central Government" as synonymous with "United States" as indicating the body-politic possessing the national sovereignty is so common that this usage will be followed in this treatise.

notwithstanding, and irrespectively of what may be the opinions and efforts of those exercising the political powers of these States.

The individual Commonwealths, having a political status only as members of the Union, have not the legal power to place themselves, as political bodies, in opposition to the national will. Their legislatures, their courts or their executive officials may attempt acts unwarranted by the Federal Constitution or Federal law, and they may even command generally that their citizens shall refuse obedience to some specified Federal laws or to the Federal authorities generally, but in all such cases such acts are, legally viewed, simply void, and all individuals obeying them subject to punishment as offenders against national law. The fact that their respective States have directed them to refuse obedience or offer resistance to the execution of the Federal laws can afford them no immunity from punishment, for no one can shelter himself behind an unconstitutional measure which is, in truth, not a law at all, but only an unsuccessful attempt at a law.<sup>3</sup>

### Constitutional law

In the broadest sense of the term, every politically organized society possesses a Constitution. By this is meant that it possesses a body of rules or principles which determine the form of government which shall exist, and allot to its various departments or officials their respective powers. When these rules are fairly definite, are recognized by those in authority as controlling, and are supported by a public opinion sufficient in force to offer a considerable guarantee that they will be obeyed, the State is said to

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<sup>3</sup> See for a correct statement of this principle the first annual message of President Lincoln.

have a constitutional government. Thus, if the political rule is monarchical in character, the government is said to be a constitutional monarchy. But, in an exact sense of the term, every politically organized society may be said to possess a Constitution, written or unwritten.

In order that the rules that regulate the distribution and exercise of political authority may be better and more exactly known, they are, in most modern States, reduced to definite written statement; and in order that, as thus stated, they may have an additional binding force, they are usually drafted and adopted in some especially formal and solemn manner, and, in most cases, special provision is made as to the manner in which they may be revised and additions made to them. Ordinarily this method of revision and amendment is made considerably more difficult than is the enactment of ordinary legislative measures.

Among the modern great nations Great Britain stands alone as a State without a formal written instrument of government. She has, however, a government controlled by a definite body of constitutional rules and practices, many of these being embodied in important written documents, such as the Magna Charta, the Bill of Rights, the Habeas Corpus Act, etc., but, however politically sacrosanct these principles thus definitely stated, and however controlling in practice the great body of her written public law, the essential characteristic of England's constitutional system is that she is ruled by a legally omnipotent Parliament which has the legislative power to change, by ordinary statutory enactment, any or every feature and rule of her governmental organization. In this last respect it is to be observed, however, that, legally speaking, Great Britain does not in fact stand upon a different footing from those States which have adopted written instruments of government the

amendment or final interpretation of which is within the control of the legislative branch.

The adoption of written Constitutions does not prevent the existence and development of bodies of unwritten constitutional law; for, however comprehensive these fundamental documents may be, there inevitably grows up a considerable body of unwritten constitutional practices as fixed and, for all practical purposes, as obligatory as those provided for in the written instruments. Furthermore, in any event, a written Constitution requires interpretation, and when the power of interpretation is confided to the courts there necessarily develops in the decisions which are rendered a constantly increasing body of rules and principles which in the aggregate compose the constitutional law of the country. Thus, in the United States, in the more than two hundred volumes of the decisions of the Federal Supreme Court, not to speak of the reported opinions of the State and lower Federal courts, a complex system of constitutional jurisprudence has developed which requires the preparation of lengthy and elaborate commentaries for its statement and explanation.

From what has been said it is seen that if we are to seek a definition of constitutional law, valid for all countries, and which will distinguish it from other classes of law, we cannot accept as its peculiar characteristic the fact that it is found embodied in written and formally adopted and promulgated documents denominated Constitutions. Nor can we select as its distinguishing mark the fact that it is of superior legal validity. For, not to speak of England, which, according to such a description, could not be said to have any constitutional law at all, we are met by the fact that in no country other than our own is this legal superiority of constitutional law fully recognized. For a general definition of constitutional law we are thus thrown back upon its subject-matter, and are



obliged to content ourselves with the description with which we started, namely, that it embraces all those rules and principles which determine the form of governmental organization of a State, and allot to its several organs or departments their respective powers.

This, for the purpose of general political theory, is a correct definition of constitutional law. But it is not a definition which is adequate for a nation, such as the United States, living under written Constitutions which give to the courts their final interpretation, and which obligates them, in cases of conflict between these written constitutional provisions and ordinary statutory laws, to give precedence to the former. Under this system constitutional law must be said to embrace all law that, irrespective of its substance, is contained within the four corners of written instruments of government denominated Constitutions. Were these constitutions wholly devoted to the creation of governmental machinery and the allotment of powers to its constituent parts, the law embraced within this formal definition would substantially coincide with that included within the definition stated above as satisfactory to the political theorist. But, in fact, many of our State Constitutions go far beyond this and include provisions which, viewed with regard to the matters to which they relate, properly belong within the field of private statutory law.

The Federal Constitution has of course a double function to perform. It has not only to provide for a governmental machinery for the Union, and to distribute its powers, but to delimit the respective competencies of the Nation and of the individual States. Regarded as an instrument for this second purpose it is a grant of power giving to the United States those powers which it is to possess, and leaving with the States, with but a few enumerated exceptions, those powers which are not so granted,

The State Constitutions are, upon the contrary, primarily instruments of limitation. In so far as they are not devoted to providing machineries of government, they have for their end and aim the placing of limitations upon the governments which they create, which governments are held to possess all powers not denied to them by the Federal Constitution or specifically withdrawn from them by the respective Constitutions to which they owe their origin. These State constitutional limitations are for the most part upon the legislatures, and the increase in their number which the more recently adopted Constitutions have shown has evinced a growing distrust upon the part of the people of their legislative representatives. This distrust has also been shown in some instances by the insertion of provisions for the referendum and the popular initiation of laws. But not a few of these added constitutional clauses have been due to a distrust of the courts, the aim being so explicitly to authorize legislation as to render it practically impossible for the courts to interpose the objection of unconstitutionality as tested by the State Constitutions.<sup>4</sup>

### **The American doctrine of the supremacy of the Constitution**

It has already been indicated that in the United States

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<sup>4</sup> This, however, still leaves it possible for the State courts to hold State statutes void upon the ground that they are in conflict with the Federal Constitution, and especially with that clause of the Fourteenth Amendment which declares that "no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In those cases in which its courts so hold, there is, under existing statutes, no right of appeal by writ of error to the Supreme Court of the United States, for, by the twenty-fifth section of the judiciary act, which is still in force, that tribunal is given jurisdiction to review decrees of the State courts, by writs of error, only in those cases in which a Federal right, privilege, or immunity has been claimed and denied.

the courts are the final interpreters of the constitutional powers not only of executive and administrative officers but of the legislatures themselves. Independently of express statement to this effect in the Constitution it has become an established principle that no statute is valid if inconsistent with the provisions of the Constitution from which the enacting legislature derives its powers. So, similarly, no act or order of an executive official is legal for the performance or issuance of which a constitutional authorization cannot be shown. A State statute inconsistent with the Constitution of that State is, therefore, invalid, and an act of Congress not warranted by the provisions of the Federal Constitution is similarly void. In addition to being subordinate to the provisions of the State Constitution, every act of a State official or organ must conform to the requirements of the Federal Constitution, and this applies as well to the provisions of the Constitution of the State as to the statutes of its legislature.

This principle that statutory law in order to be valid must be in conformity with constitutional requirements is a product of American jurisprudence, and peculiar to it. In this country alone is the written constitutional law not only morally, but legally restrictive of the lawmaking branch of the government, and the final interpretation of these restrictions, express and implied, vested in the judicial department.<sup>5</sup>

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<sup>5</sup> Professor A. V. Dicey in his well-known treatise, *The Law of the Constitution* (7th ed., 1908, note vii, Appendix), calls attention to the three different meanings of the phrase "unconstitutional law" as employed in England, France, and the United States. In England it means simply that, in the opinion of the person using it, the measure is opposed to the spirit of the unwritten principles of constitutional practice, but not that it is, for that reason, void of legal force. In France the term means that the act is contrary to the provisions of the written Constitution, but not that the courts

One further point with reference to the nature of the power exercised by courts when passing upon the constitutional validity of laws requires mention. This is that the point at issue between the legislature and the courts, or between an appellate tribunal and the courts whose decrees it reviews, is often a question not as to the meaning to be given to constitutional provisions, but as to the correctness of certain findings of fact. Thus, to illustrate, a State legislature having prescribed a maximum rate which railroads may charge, or established a rule as a proper police regulation, it may become necessary for the court to determine whether in fact the prescribed rate is so low as to be confiscatory and therefore to amount to a taking of property without due process of law, or whether the police regulation is in fact, all the circumstances involved being considered, a reasonable one and the consequent limitation upon the private rights of property or freedom of contract justified as such. Here there is no dispute as to the meaning of the constitutional provision with reference to the taking of property without due process of law, nor any denial of the right of the Federal Supreme Court to hold void State laws which violate this provision. The only dispute or question involved is whether in fact the given rate is confiscatory, or whether the police regulation is justified as a legitimate exercise of the so-called "Police Power."

This American doctrine as to the invalidity of unconstitutional legislative acts had received a certain degree will refuse to recognize its legal validity. The word "unconstitutional," says Dicey, "would probably though not of necessity be, when employed by a Frenchman, a term of censure." In the United States an unconstitutional measure is one not warranted by the written instruments of government of the States or of the United States, and, as such, is held not to be a law at all. It is an *ultra vires* measure, and at most only a vain attempt upon the part of the enacting body to create a law.

of acceptance, though not without protest, in the courts of the States prior to 1803, but it was first in that year in the great case of *Marbury v. Madison*<sup>6</sup> that the Supreme Court of the United States by its acceptance of it, and Chief Justice Marshall by the opinion which he rendered in support of it, finally established the doctrine as a fundamental principle of American constitutional jurisprudence. It is true that Marshall's reasoning is defective in so far as it is based on the idea that this judicial power necessarily exists in a government organized under a written Constitution, but he is upon firm ground when he points out that the Federal judicial power is extended to "all cases, in law or equity, arising under the Constitution," and that, in the exercise of this jurisdiction, thus specifically given, it is necessary that in cases involving conflicts between statutory and constitutional provisions, the courts should give effect to the Constitution under which they are organized.

### **Constitutionality of State laws**

When it is said that the power vested in the courts of this country to hold void measures enacted by the law-making branch of the governments of which they themselves constitute the judicial branch, is a unique one, no reference is had to the authority of our judicial tribunals to refuse to recognize the validity of those acts of the legislatures of the States which are in conflict with the provisions of the Federal law, for this is a right determined by the supremacy of national law over State law. This supremacy is clearly stated in that provision of Article VI of the Federal Constitution which declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United

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<sup>6</sup> 1 Cr. 137; 2 L. ed. 60.

States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." It was, indeed, for a time strenuously argued by adherents of the States' Rights school that the right of final determination as to whether there is a conflict between State and Federal law was possessed by the State courts as well as by the Federal Supreme Court, in cases arising therein, but, the Federal supremacy being conceded the right to hold State laws invalid because contrary to the Federal Constitution and to the laws passed and treaties entered into in pursuance thereof is not a different power from that known to or exercised by all constitutional States, when dealing with the acts or ordinances of subordinate lawmaking bodies, as for example of colonial or local legislatures, or, indeed, of administrative agencies with reference to the rules and regulations issued by them. Here the general doctrine of principal and agent applies. When, however, we turn to the power of our Federal courts to hold void the acts of Congress, or of the State courts to refuse recognition to the acts of the legislatures of their respective States, the question is quite another one. Here we have the exercise by the judicial branch of a government of the right to place its interpretation of the power granted by a written Constitution above the interpretation which the legislative branch of that same government has given it. In all countries other than our own the legislative interpretation is recognized as decisive.

The general principle is that a law held void, because unconstitutional, is as though it had never been. It is declared never to have been a law, and hence that no legal rights can be claimed under it. If, however, by a later decision, the court reverses its former opinion, and upholds the law, it is considered as having been in force

and valid from the time of its enactment. In practice, as a matter of justice and of expediency, these principles have at times been departed from, but in general the rule is as stated.<sup>7</sup>

The expediency of giving this power to the courts is of course, open to discussion. That it is a tremendous power cannot be questioned. As said by Bishop Hoadly years before our Constitution was adopted, "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them." It would seem clear that by training, by tenure of office, and by the character of the functions which they perform, the judges of the Federal Supreme Court and of the highest courts of the States are less likely to be hurried on, under the pressure of passion or of temporary exigency, to such a violation of the spirit, or to such a strained construction of the language, of the Constitution as will deprive that instrument of its true restraining character. But, upon the other hand, there is the danger, which not a few persons think has in some instances become a reality, that the judges, not being in close touch with or responsible to public opinion, will assume an unnecessarily strict or biased attitude towards the constitutional powers of the legislature, and especially towards those relating to what is known as the police powers of the State. In general, however, it is to be said that the courts, have, by the rules which they have laid down for themselves with reference to the validity of legislative acts, kept their authority within just and expedient limits. These rules are considered in Chapter III.

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<sup>7</sup> Norton v. Shelby Co., 118 U. S. 425; 6 Sup. Ct. Rep. 1121; 30 L. ed. 178. But see Gelpcke v. Dubuque, 1 Wall. 175; 17 L. ed. 520; and exceptions coming under the doctrine of *de facto* officers and corporations acting under unconstitutional statutes.

## CHAPTER II

### THE SUPREMACY OF FEDERAL AUTHORITY

#### **Federal supremacy**

The supremacy of the Federal Government, when operating within its constitutional sphere, over all persons and bodies politic within its territorial limits, is no longer open to question. That the extent of this Federal constitutional sphere of action is to be determined in the last resort by the Federal Supreme Court, is equally well settled.

The maintenance of this supremacy unimpaired, while at the same time preserving to the States their proper autonomy and independence of action, has, however, been a difficult task; and, so long as the Federal form is retained, this task will continue to tax to the utmost the legal and political abilities of our courts and political bodies. With a quite proper motive those who have controlled the public actions of the States, and those who have guided the activities of the United States, have sought for their respective governments the greatest possible constitutional power and independence, and, therefore, have not hesitated to occupy debatable territory. Thus, without there being any denial of the supremacy of the Federal law, when operating within its proper field, or of the right of the Federal Supreme Court to determine, in final resort, the extent of that proper field, frequent conflicts have resulted. These conflicts in their many and varied forms furnish much of the material for the present treatise, and they will be severally considered in their proper places.



For the manner in which the Federal supremacy is in practice maintained, especial reference may, however, be made to the chapters and sections dealing with the immunity of Federal agencies from State taxation; the power of the Supreme Court to review decisions of State courts adverse to privileges, rights, and immunities claimed under the Federal Constitution, treaties or laws; the removal of cases from State to Federal courts; the issuance by Federal courts of writs of habeas corpus directed to State officials; and the independence of Federal courts from State interference or control. It will, however, be appropriate to refer here to certain cases in which the supremacy of the Federal authority has been broadly stated and under circumstances which have given especial weight and importance to the assertion.

In general it may be stated that in no instance has the Supreme Court failed to assert the supremacy of the Federal power when its authority has been attacked by the States. Only four years after the adoption of the Constitution the court upheld its right under the Constitution as it then stood, *i. e.*, before the adoption of the Eleventh Amendment, to entertain a suit against the State of Georgia brought by a citizen of another State.<sup>1</sup> The next year the court clearly intimated that it would disregard a State law in conflict with a Federal treaty. The supremacy of Federal law was again asserted the next year in *Penhallow v. Doane*,<sup>2</sup> and in 1796 in *Ware v. Hylton*.<sup>3</sup> In *Calder v. Bull* <sup>4</sup> the doctrine was definitely asserted, though its application was not found necessary, that a State law in conflict with the Federal Constitu-

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<sup>1</sup> *Chisholm v. Georgia*, 2 Dall. 419; 1 L. ed. 440.

<sup>2</sup> 3 Dall. 54; 1 L. ed. 507.

<sup>3</sup> 3 Dall. 199; 1 L. ed. 568.

<sup>4</sup> 3 Dall. 386; 1 L. ed. 648.

tion would be disregarded. In 1809, in *United States v. Peters*<sup>5</sup> this action became necessary and the doctrine was applied, Chief Justice Marshall, speaking for the unanimous court, saying: "The State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause." "It will be readily conceived," the great Chief Justice concludes, "that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and, therefore, must be performed. A peremptory mandamus must be awarded."

In 1810 and 1812 State laws were again held void by the Supreme Court because in conflict with the Federal Constitution.<sup>6</sup> Finally, in the great case of *McCulloch v. Maryland*,<sup>7</sup> decided in 1819, not only was a State law held void, but the general doctrine declared that the State cannot, in the exercise of its reserved powers, even of the highest of them, interfere with the operation of a Federal agency though that agency be one of convenience only and not of necessity to the United States. "The States have no power," it was declared, "by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

In *Martin v. Hunter's Lessee*,<sup>8</sup> decided in 1816, and

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<sup>5</sup> 5 Cr. 115; 3 L. ed. 53.

<sup>6</sup> *Fletcher v. Peck*, 6 Cr. 87; 3 L. ed. 162; *New Jersey v. Wilson*, 7 Cr. 164; 3 L. ed. 303.

<sup>7</sup> 4 Wh. 316; 4 L. ed. 579.

<sup>8</sup> 1 Wh. 304; 4 L. ed. 97.

in *Cohens v. Virginia*,<sup>9</sup> decided in 1821, the Supreme Court upheld its authority to review, on writs of error, decisions of State courts adverse to alleged Federal rights, the exercise of this jurisdiction having been provided for by the famous twenty-fifth section of the judiciary act of 1789. Justice Story who spoke for the court, said: "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."

In *Cohens v. Virginia*, Chief Justice Marshall, speaking for the court, said: "If it could be doubted, whether from its nature it [the National Government] were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' This is the authoritative language of the American people, and, if the gentlemen please, of the American States. . . . The people made the Constitution and the people can unmake it. . . . But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of

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<sup>9</sup> 6 Wh. 264; 5 L. ed. 257.

repelling it. . . . The framers of the Constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the States, or of the people for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws; and this it was the part of wisdom to attempt. We think they have attempted it."

The importance of the doctrine thus emphatically declared in these two cases it is impossible to exaggerate. This the upholders of States' Rights clearly saw, and Calhoun later wrote: "The effect of this is to make the government of the United States the sole judge, in the last resort, as to the extent of its powers, and to place the States and their separate governments and institutions at its mercy. It would be a waste of time to undertake to show that an assumption that would destroy the relation of co-ordinates between the government of the United States and those of the several States,—which would enable the former, at pleasure, to absorb the reserved powers and to destroy the institutions, social and political, which the Constitution was ordained to establish and protect, is wholly inconsistent with the Federal theory of government, though in perfect accordance with the national theory. Indeed, I might go further and assert, that it is, of itself, all sufficient to convert it into a national, consolidated government." <sup>10</sup>

During the same year that the case of *McCulloch v. Maryland* was decided, two other State laws were held void by the Supreme Court: one of New York, in *Sturges*

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<sup>10</sup> *Discourse on the Constitution and Government of the United States*, Works, I, 338.

*v. Crowninshield*,<sup>11</sup> and one of New Hampshire, in *Dartmouth College v. Woodward*.<sup>12</sup>

In 1824, in *Osborn v. Bank of the United States*<sup>13</sup> the attempt of Ohio to tax the Federal bank was held unconstitutional. In 1829, in *Weston v. Charleston*,<sup>14</sup> a municipal tax on stock of the United States held by the citizens of Charleston was held invalid. In 1824, in the case of *Gibbons v. Ogden*,<sup>15</sup> was begun that long line of decisions which has established the power of the United States to regulate interstate commerce free from State interference—an authority the exercise of which has done so much to increase the actual power and influence of the National Government. In this case a law of the State of New York was held void.

In 1823, a law of Kentucky was held of no force by the Federal court,<sup>16</sup> and in 1830 a law of Missouri received similar treatment.<sup>17</sup> In 1832 in *Worcester v. Georgia*,<sup>18</sup> an act of the State of Georgia was held void, but the Supreme Court failed to secure the release of the plaintiff who had been imprisoned under it. This failure was due, however, not to the weakness on the part of the Federal Government but to the refusal of the President to lend his executive aid. 50,000

From 1835 to the outbreak of the Civil War there can be no question but that the Supreme Court of the United States exerted a much less potent influence in solidifying and expanding the Federal power than it had exercised

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<sup>11</sup> 4 Wh. 122; 4 L. ed. 529.

<sup>12</sup> 4 Wh. 518; 4 L. ed. 629.

<sup>13</sup> 9 Wh. 738; 6 L. ed. 204.

<sup>14</sup> 2 Pet. 449; 7 L. ed. 481.

<sup>15</sup> 9 Wh. 1; 6 L. ed. 23.

<sup>16</sup> *Green v. Biddle*, 8 Wh. 1; 5 L. ed. 547.

<sup>17</sup> *Craig v. Missouri*, 4 Pet. 410; 7 L. ed. 903.

<sup>18</sup> 6 Pet. 515; 8 L. ed. 483.

during the thirty-five years preceding. Regarding the attitude of the Supreme Court during this period, the important fact is, however, to be noticed that, though it threw the weight of its influence on the side of the States so far as concerned a liberal interpretation of the powers reserved to them by the Constitution, not once, in the slightest measure, did it during these years, any more than it had done in the years preceding, intimate that the actual legal and political supremacy was not vested in the National Government. The position of Taney and of the court was clearly shown upon this point in the judgment rendered and in the opinion delivered in the case of *Ableman v. Booth*,<sup>19</sup> decided in 1859. The facts of this case were these: Booth had been tried in a lower Federal court for a violation of the Federal fugitive slave law of 1850, and had been found guilty and sentenced to imprisonment. The highest court of the State of Wisconsin, however, stepped in, disregarded this judgment, and released the prisoner. Not only this but it went on to declare that its decision, thus rendered, was subject to no appeal and was conclusive upon all the courts of the United States; and when a writ of error from the United States Supreme Court directed to the Wisconsin court was issued, the clerk of the State court replied to it that he had been directed to make no return, and refused to make up and send a record of the case to the Federal court. Thereupon the Attorney-General of the United States filed in the Supreme Court of the United States an uncertified record which it was ordered should be received as though returned by the clerk of the court of Wisconsin. Having thus gotten the case before it, despite the resistance of the State, the decision of the Supreme Court thereupon was an emphatic condemnation of the State's

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<sup>19</sup> 21 How. 506; 16 L. ed. 169.

action. "No State, judge or court," declared Taney who rendered the opinion of the court, "after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the State, in form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in the custody of his prisoner, it would be his duty to resist, and to call to his aid any force that might be necessary to maintain the authority of the law against illegal interference."

### Secession illegal

From the foregoing brief review it is thus seen that prior to the Civil War the supremacy of the Federal law had been sustained under a wide variety of circumstances and that the resulting subordinate status of the States had been made fully evident. That status the people of certain of the Southern States, in 1861, decided no longer to support, and in defense of their views, declared their respective commonwealths independent of the Union, and in support of this independence resorted to the arbitrament of war. That this secession was an illegal act, and that, therefore, the seceding States, from the constitutional view point, never were out of the Union, has repeatedly been declared by the Supreme Court. In *Texas v. White*<sup>20</sup> the Union was declared to be "an indestructible Union composed of indestructible States." The opinion continues: "When, therefore, Texas became one of the United States, she entered into an indissoluble relation. . . . The act which consummated her admission into the Union was something more than a compact;

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<sup>20</sup> 7 Wall. 700; 19 L. ed. 227.

it was the incorporation of a new member into the political body. The union between Texas and the other States was as complete, as perpetual and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through the consent of the States. Considered, therefore, as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union."

In *Knox v. Lee*,<sup>21</sup> the court said, speaking through the mouth of Justice Bradley: "The doctrine so long contended for, that the Federal Union was a mere compact of States, and that the States, if they chose, might annul and disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the General Government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has been finally effected by the national power, as it had often been before by overwhelming argument. . . . The United States is not only a government, but it is a National Government, and the only government in this country that has the character of nationality."

### **Plenitude of Federal powers**

The possession by the Federal Government of full

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<sup>21</sup> 12 Wall. 457; 20 L. ed. 287.



power to protect any right and to enforce any law of its own, at any time, and at any place within its territorial limits, against the resistance of individuals, or State officials, acting with or without the authority of State law, has been uniformly asserted by the Supreme Court whenever such an assertion has been necessary. The attitude of the Federal Supreme Court in the case of *Ableman v. Booth*, decided in 1859, has already been mentioned. Again, after the Civil War, the court said, when confronted by the proposition that because the United States was without any general criminal jurisdiction it might not punish criminally individuals who had violated certain of its laws relating to congressional elections: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and power of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

Finally in the *Debs* case,<sup>22</sup> a case growing out of the great railroad strike in 1894, the plenitude of the Federal power was emphatically stated. Speaking of the right of the National Government to protect, by armed force if necessary, interstate commerce and the transportation of

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<sup>22</sup> *In re Debs*, 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

the mails, the court said: "If the inhabitants of a single State or a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecution of such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known and the National Government had no other way to enforce the freedom of interstate commerce or the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the Nation in these respects would be at the absolute mercy of a portion of the inhabitants of a single State. But there is no such incompetency in the National Government. The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."

## CHAPTER III

### PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION—CIRCUMSTANCES UNDER WHICH THE COURTS WILL HOLD AN ACT OF CONGRESS VOID

#### Rules governing constitutionality of laws

Because an act of Congress is the declaration of a co-ordinate branch of the National Government, the courts have established for themselves certain more or less definite rules governing the conditions under which they will undertake to pass upon the constitutionality of Federal statutes. These rules are self-established, under a sense of propriety and expediency, and are not created by any constitutional necessity.

Courts of first instance will not hold an act unconstitutional except in clear cases, but will leave this to the final judgment of the higher courts. Inferior courts hold themselves bound by the prior decisions of superior courts as to the validity of an act, even though new reasons, *pro* or *contra*, are raised. The presumption is that all possible arguments were in fact considered by the superior courts.

The Supreme Court has held that, ordinarily, it will not hold a law void except by a majority of the full bench.<sup>1</sup>

The courts will not pass upon the constitutionality of a law except in suits duly brought before them at the instance of parties whose material interests are involved.<sup>2</sup>

<sup>1</sup> New York *v.* Miln, 8 Pet. 120; 8 L. ed. 888.

<sup>2</sup> For a recent review of the doctrine see David Muskrat *v.* U. S., 219 U. S. 348; 31 Sup. Ct. Rep. 250; 55 L. ed. 246. The force of advisory opinions is discussed in Thayer's *Cases on Constitutional Law*, 175.

The Supreme Court will not pass adversely upon the validity of an act of Congress unless it is absolutely necessary for it to do so in order to decide the question at issue.<sup>3</sup>

When it is possible to do so without doing too great violence to the words actually used, the language of a statute will be so restricted as to render the measure constitutional. For the court will always presume that the legislature did not intend to exceed its constitutional powers.<sup>4</sup> Where, however, the scope of the law is plainly expressed, and as such is unconstitutional, the court will not resort to a strained or arbitrary interpretation to bring the law within constitutional limits.<sup>5</sup>

The court will not permit the unconstitutionality of a particular provision of a law to invalidate the entire law if it is possible to separate the invalid provision from the other provisions without destroying or impairing their efficiency to attain the results evidently intended by the legislature that enacted them. Even when thus separable, however, the court will not hold the remainder of the law valid if there is a doubt whether, the realization of the whole of its will being rendered impossible, the legislature would have desired the execution of a part only.<sup>6</sup>

With the motives of the legislators the courts will not

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<sup>3</sup> But see *Marbury v. Madison*, 1 Cr. 137; 2 L. ed. 60, and *Dred Scott v. Sandford*, 19 How. 393; 15 L. ed. 691.

<sup>4</sup> *Knights Templar Indemnity Co. v. Jarman*, 187 U. S. 197; 23 Sup. Ct. Rep. 108; 47 L. ed. 139; *U. S. v. D. & H. Ry. Co.*, 213 U. S. 366; 29 Sup. Ct. Rep. 527; 53 L. ed. 836.

<sup>5</sup> *Howard v. Ill. Cen. R. R. Co.*, 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. ed. 297; *James v. Bowman*, 190 U. S. 127; 23 Sup. Ct. Rep. 678; 47 L. ed. 979.

<sup>6</sup> But see *U. S. v. Reese*, 92 U. S. 214; 23 L. ed. 563. See also *Columbia Law Review*, Feb., 1911, article "Partial Unconstitutionality with Special Reference to the Corporation Tax," by Alfred Hayes, Jr.

concern themselves. "The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of government. That it may not do with safety to our institutions." <sup>7</sup>

The power of Congress to legislate being conceded, the wisdom or expediency of the manner in which the power is exercised is held to be beyond judicial criticism or control.<sup>8</sup>

Finally, the courts are guided in their judgments by the rule that every reasonable presumption shall be in favor of the validity of a questioned legislative act. As the Supreme Court have said in an important case: "The declaration [that an act of Congress is void] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt." <sup>9</sup>

The rule of construction that has last been stated has especial application to acts of Congress. When the con-

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<sup>7</sup> *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; 14 Sup. Ct. Rep. 1125; 38 L. ed. 1047; *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Sup. Ct. Rep. 436; 48 L. ed. 679; *McCray v. U. S.*, 195 U. S. 27; 24 Sup. Ct. Rep. 769; 49 L. ed. 78; *Ex parte McCardle*, 7 Wall. 506; 19 L. ed. 264.

<sup>8</sup> *Treat v. White*, 181 U. S. 264; 21 Sup. Ct. Rep. 611; 45 L. ed. 853; *Patton v. Brady*, 184 U. S. 608; 22 Sup. Ct. Rep. 493; 46 L. ed. 713.

<sup>9</sup> *Knox v. Lee*, 12 Wall. 457; 20 L. ed. 287. This doctrine has been repeatedly declared. Whether it has always been followed there is room for doubt. For an especially acute discussion of this principle of construction see Thayer, *Origin and Scope of the American Doctrine of Constitutional Law* (published originally in *Harvard Law Review*, republished in the volume entitled *Legal Essays*, 1908). See also *Political Science Quarterly*, XXIV, 193, article "Growth of Judicial Power," by W. F. Dodd.

stitutionality of a State law is involved, the principle is not always applicable. If the question at issue is as to whether a given power resides in the Federal Government or in the States, the fact that a State legislature in its enactment has asserted that it is vested in the States, raises no presumption in favor of the validity of this claim. The Supreme Court in passing finally upon this point is not called upon to review the act of a co-ordinate department, but has to decide between the conflicting claims of two governments, and, quite properly, feels itself at liberty to decide the point as an original proposition; namely, upon the basis of its own judgment as to what is the most reasonable construction of the constitutional provisions involved.

If, however, the State law, whose constitutionality is questioned, is with reference to a matter admittedly within the province of the States, and the question is simply whether the power has been properly exercised, there is held to be a strong presumption that the act is constitutional. Thus, for example, if it be a question whether the States have a power to regulate interstate commerce, or to tax a national bank, or to naturalize aliens, or enact bankruptcy laws, there is no presumption in favor of the constitutionality of acts in which the State power is asserted. If, however, it is a question, for example, whether the police powers, admittedly belonging to the States, have been constitutionally exercised, the presumption is that they have been so exercised.

When the Federal Supreme Court is called upon to consider the constitutionality of a State law as determined by its conformity with the Constitution of the State, the State Constitution is construed as having for its general purpose the placing of limitations upon the powers of the legislature; whereas, of course, the Federal

Constitution is viewed as a grant of legislative power. In other words, whereas the Federal legislature is construed to have only those powers granted to it expressly or impliedly by the Federal Constitution, the State legislatures are considered to possess all powers not expressly or impliedly withdrawn from them by the Federal or respective State Constitutions.

In those cases in which the courts of the States are called upon to consider the constitutionality of the acts of their own lawmaking bodies, as tested by the Federal or their own State Constitutions, they of course have to deal with the acts of a department of government co-ordinate in power with themselves; and, therefore, hold themselves, or at least should hold themselves, bound in all cases to give to the laws that same benefit of rational doubt which the Federal Supreme Court gives to acts of Congress.

The presumption of constitutionality which attaches to an act of Congress is increased when the legislative interpretation has been frequently applied during a considerable number of years, or when it dates from a period practically contemporaneous with the adoption of the Constitution, or when, based upon a confidence in its correctness, many and important public and private rights have become fixed.<sup>10</sup>

The Supreme Court has, however, never held itself absolutely bound by a legislative or executive construction (political questions excepted) however long acquiesced in, or however nearly contemporaneous in its first statement with the adoption of the Constitution.<sup>11</sup>

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<sup>10</sup> *Lithographic Co. v. Sarony*, 111 U. S. 53; 4 Sup. Ct. Rep. 279; 28 L. ed. 349.

<sup>11</sup> *Swift v. United States*, 105 U. S. 691; 26 L. ed. 1108. The doctrine is carefully reviewed in *Fairbanks v. United States*, 181 U. S. 283; 21 Sup. Ct. Rep. 648; 45 L. ed. 862.

**Extrinsic evidence**

Generally speaking, in the construction of the Constitution the well-known distinctions between latent and patent ambiguities, and between the use of extrinsic and intrinsic evidence apply. When the language of the instrument is itself indefinite or is such that more than one meaning may, by grammatical construction, be drawn from its terms, the courts base their determinations upon the language and provisions found within the four corners of the instrument, and without resort to extrinsic evidence. The governing point is as to what is actually written. If a given power may rationally, logically, and grammatically be construed as granted by a given provision, then it is of no countervailing force to adduce the fact that such was not the intention of those by whom the instrument of government was established.

**Technical terms**

When, however, there is no ambiguity of grammatical construction, but the words themselves require definition, recourse is properly had to extrinsic evidence. Here it is necessary to learn from extrinsic sources the meanings usually attached to these words at the time the Constitution was framed and, presumably, by those who framed and adopted the Constitution. Examples of such technical terms are "letters of marque and reprisal," "ex post facto," "bill of attainder," "bankruptcy," "admiralty," "equity," "direct tax," "duties," "imposts," "excises," "piracy," "habeas corpus," "citizen," "alliance," "confederation," "republican form of government," "infamous crime," "commerce," etc. The technical term "treason" is defined in the Constitution itself.

As has been repeatedly declared by the courts the best rule for interpreting the technical terms employed in the Constitution is to give to them the meaning which they



had at the time that instrument was framed and adopted. When the terms are technical law terms they are to be given the meaning attached to them in the English common law.<sup>12</sup> In a few instances, however, the Supreme Court has refused to give to technical terms the meanings attached to them in 1789 by the common law. This has been so especially with reference to the words "admiralty" and "bankruptcy" both of which terms have been given a broader meaning than that furnished by the English law.

### **The interpretative value of debates in constitutional conventions**

When it is necessary and proper to resort to extrinsic evidence in interpreting the Constitution, an important source of such evidence is to be found in the history of the events which led up to its adoption. Of special importance are the recorded proceedings of the convention which drafted, of the State conventions which ratified, and the public utterances of the men who played an important part in the establishment of, the Constitution. Resort is, however, to be had to these sources only where latent ambiguities are to be resolved. Cooley has stated, in a manner not to be improved upon, the weight properly to be ascribed to these records. He says: "When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. When the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but when the question is one of abstract

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<sup>12</sup> In *South Carolina v. U. S.*, 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261, many illustrations of the application of this rule are given.

meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark and abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. These proceedings, therefore, are less conclusive to the proper construction of the instrument than are legislative proceedings to the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. The history of the calling of the convention, of the causes which led to it, and the discussions and issues before the people at the

time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the convention.”<sup>13</sup>

### The Federalist

What has been said regarding the interpretative value of the debates in the conventions which framed and ratified the Constitution, and the value of contemporary interpretation thereof by Congress and the Executive, applies almost equally to the collection of essays published under the title of *The Federalist*. This is true of these essays not only because of their respective authors—Hamilton, Madison and Jay—but because of the purpose for which they were prepared and published, which was to persuade the several State conventions to ratify the Constitution. Having this construction of the Constitution before them, there are considerable, though not conclusive, grounds for holding that, the meaning thus published and not repudiated, was the construction intended by those who put the Constitution into force. The case of *Chisholm v. Georgia* is, however, a conspicuous instance in which a view advanced in *The Federalist* (that a State would not be suable in the Federal courts at the instance of a citizen of another State) was repudiated by the Supreme Court.

### History of the times

Occasional resort has been had to the history of the times at which the Constitution or an amendment thereof was adopted in order to determine the purpose and thus the meaning of a questioned provision. Conspicuous instances of this are *Prigg v. Pennsylvania*,<sup>14</sup> and the

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<sup>13</sup> *Constitution Limitations*, 7th ed., 101.

<sup>14</sup> 16 Pet. 539; 10 L. ed. 1060.

Slaughter House Cases.<sup>15</sup> It is to be emphasized, however, that extrinsic evidence of this kind may never properly be used to support an interpretation which the written word does not upon its face reasonably permit. In other words, this evidence may properly be used to decide between two possible constructions of the written word, but not to add to or subtract from its express provisions.

### **Interpretative value of legislative debates**

As in the case of the examination of the Constitution itself, the courts in considering the constitutionality of a statute hold themselves bound by the words of the statute, that is, they determine the intent of the legislature by the words it has employed. And, therefore, they will not resort to legislative debates except where necessary to resolve a latent ambiguity.<sup>16</sup> In *Standard Oil Co. v. United States*,<sup>17</sup> however, the court point out that although debates may not be used as a means for interpreting a statute, that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a par-

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<sup>15</sup> 16 Wall. 36; 21 L. ed. 394. In this case the court though appealing to a history of the times did in fact give to a clause of the Fourteenth Amendment a meaning not only other than that which its language upon its face would bear, but different from that which those who framed it probably intended that it should have.

<sup>16</sup> *Maxwell v. Dow*, 176 U. S. 581; 20 Sup. Ct. Rep. 448; 44 L. ed. 597. It is to be remarked, however, that the courts though constantly reiterating the doctrine as to the impropriety of a resort to legislative debates for purposes of construction do indeed often refer to them in support of the positions which they assume. See, for example, both the majority and minority opinions in *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007; and *U. S. v. D. & H. R. R. Co.*, 213 U. S. 366; 29 Sup. Ct. Rep. 527; 53 L. ed. 836.

<sup>17</sup> 221 U. S. 1; 31 Sup. Ct. Rep. 502; 55 L. ed. 619.

ticular law, that is, the history of the period when it was adopted.

### **Resort to the Preamble for purpose of construction**

The value of the Preamble to the Constitution for purposes of construction is similar to that given to the preamble of an ordinary statute. It may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, where the intention of the framers does not clearly and definitely appear. As Story says: "The preamble of a statute is a key to open the minds of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute."<sup>18</sup>

### **The Constitution is to be construed as a whole**

Though the terms of the Constitution may not be varied, or its grants of authority limited by abstract doctrines of private rights and of political justice and expediency, the words of each clause are to be interpreted in the light of the other provisions of the Constitution. The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of all the other parts.

This principle has been of dominant force in the construction of the Constitution.

The principle that the Constitution is to be interpreted in the light of the general purpose for the attainment of which it was adopted, coupled with the fact that many of its terms are general in character, has made possible and legitimate two schools of constructionists—the Loose

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<sup>18</sup> *Commentaries*, § 459. For a discussion of the weight attached to certain clauses of the Preamble, see Willoughby *Constitutional Law of the United States* §§ 19-22.

or Nationalistic school, and the Strict or States' Rights school—each dependent upon a belief held as to the general end which the framers of the Constitution had in mind when that instrument was drafted. The Strict or States' Rights constructionist has not always been one who would deny sovereignty or efficiency to the National Government. Thus, Taney, a leader of the strict constructionists, never for a moment doubted the sovereignty of the General Government, or, as he showed in his decision in *Ableman v. Booth*, the supremacy of its laws and of its agents over the laws and agents of the States. He did believe, however, that the sovereign national laws should be kept within as limited a space as possible. This he showed from the first year of his chief-justiceship.

From the general nature and intent of the Constitution have been deduced, not to mention other doctrines, the denial of the right of secession, the power of the courts to hold void State or Federal laws contrary to the Constitution, the jurisdiction of the Federal courts to entertain appeals from the highest State courts in cases in which a Federal right, privilege or immunity has been set up and denied, the immunity of Federal governmental agencies from interference on the part of the States by taxation or otherwise, the immunity of State agencies from Federal taxation, the exclusive Federal jurisdiction in matters of naturalization, and the liberal construction of "implied" powers generally.

**So-called "natural" or "unwritten constitutional" laws have no constructive force**

The so-called "natural" or unwritten laws defining the natural, inalienable, inherent rights of the citizen, which, it is sometimes claimed, spring from the very nature of free government, have no force either to restrict or extend the written provisions of the Constitution. The utmost

that can be said for them is that where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty.

In not a few instances, especially during early years, the binding force of natural laws is declared, but a careful examination of these cases shows that, practically without exception, the doctrine was used not as the real *ratio decidendi*, but to support, upon grounds of justice and expediency, a decision founded upon the written constitutional law.

### **The "spirit" of the Constitution**

Closely allied to the assertion that the Constitution is to be interpreted in the light of "natural law," is the doctrine that the fundamental purpose of the constitutional fathers was the erection of a free republican government, and that, therefore, the Constitution should, whatever its express terms may provide, never be so construed as to violate the abstract principles deducible from this fundamental fact. Generally speaking, whereas the so-called natural laws have reference to the private rights of the citizen, the protection of his person and property; these principles claimed to be deducible from the spirit of the Constitution as the framework of a free government have reference to the public and political rights of the individual.

Stated in this abstract, philosophical form, the doctrine that the "spirit" of the Constitution is to prevail over its language has no more legal validity than has the doctrine of natural law.

### **Applicability of constitutional provisions to modern conditions**

In construing the Constitution the very proper and indeed absolutely necessary principle has been followed

that that instrument was intended to endure for all time, and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to these new conditions.

Thus the grant to the Federal Government of the control over interstate and foreign commerce is held to be one the extent of which, though not its importance, is not varied by the fact that the instrumentalities by which it is carried on are widely different from those employed in 1789. On the other hand, if the writing of insurance policies, and the dealing in banking instruments of exchange were not, in 1789, considered interstate commercial transactions, and by reason of their very nature could not properly have been, no augmentation in their amount and no increase in the practical need for their Federal regulation will justify a construction that will attach an interstate commercial character to them, and thus bring them within the power of the Federal Government to control.

The principle, as it has been stated, does not prevent a construction by which the powers and limitations enumerated in the Constitution are made applicable to new conditions which were not and could not have been foreseen by those who adopted the Constitution. In the Dartmouth College case, Marshall says: "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that had this particular case been suggested the language would have been so varied as to exclude it, or it would have been made a special excep-



tion.”<sup>19</sup> Again in *Re Debs* the court say: “Constitutional provisions do not change, but their operation extends to new matters as the modes of life and habits of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation by land was by coach and wagon and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce then unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.”<sup>20</sup>

A doctrine of construction radically different from that which has just been stated, and which has never been accepted by the Supreme Court, is that which has been ascribed to James Wilson of Pennsylvania, and in recent years urged by President Roosevelt.

This doctrine is, that when a subject has been neither expressly excluded from the regulating power of the Federal Government, nor expressly placed within the exclusive control of the States, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the States are, in practical fact, unable to exercise the necessary controlling power. According, then, to this doctrine, the Ninth and Tenth Amendments which declare that: “The enumeration in the Constitution of certain rights shall not be construed

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<sup>19</sup> 4 Wh. 518; 4 L. ed. 629.

<sup>20</sup> 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092. See also *South Carolina v. U. S.*, 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

to deny or disparage others retained by the people," and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," are not to be interpreted as reserving to the States, or to the people, those powers which, though not granted to the Federal Government, are, in fact, such as are of Federal importance and which the States are unable effectively to exercise.

The foregoing doctrine is one quite different from the established doctrine of implied powers as developed by Marshall, a doctrine which will be discussed in the next chapter. That doctrine, as it will be seen, holds that from an expressly given Federal power there may be implied those powers which are necessary and proper for effectively exercising it. The doctrine thus does not justify, under any circumstances, the assumption of a new power by the Federal Government. The Wilson-Roosevelt doctrine, on the other hand, asserts that a given subject not originally within the sphere of Federal control, may, by mere change of circumstances, be brought within the Federal field. Thus, to illustrate concretely, it might be argued according to the doctrine of implied powers that as implied in authority expressly granted to Congress to regulate foreign and interstate commerce Congress might compel all corporations or individuals, manufacturing commodities for foreign or interstate commerce, to obtain a Federal license, such a license to be granted upon such terms as Congress might see fit to dictate. According to the Wilson-Roosevelt doctrine, however, it could be argued that the control of manufacturing is not expressly denied the Federal Government nor expressly placed within the exclusive control of the States, and that, under existing industrial conditions it being of Federal importance that these manufacturing concerns,

or certain of them, should be regulated, and the States being incompetent to furnish the necessary regulation, therefore, the Federal Government has the power.

Here, it will be seen, there is no resort to the commerce clause, or to any other express grant of power. The doctrine is thus one which, in the absence of express prohibition in the Constitution, will support the assumption by the Federal Government of any power whatsoever if there be fair ground for holding that regulation is needed and that the States are not able to furnish it.

In the very recent case of *Kansas v. Colorado*, decided May 13, 1907, substantially this doctrine was urged upon but repudiated by the court.<sup>21</sup>

### **Stare decisis**

There have not been many cases in which the Supreme Court has explicitly and avowedly overruled its prior decisions, but there have been frequent instances in which the doctrines declared in prior cases have been in part evaded or modified without explicit repudiation.

In *Washington University v. Rouse*, Justice Miller said: "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be closed by the decisions of a court." <sup>22</sup>

There are indeed good reasons why the doctrine of *stare decisis* should not be so rigidly applied to constitutional as to other cases. In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts

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<sup>21</sup> 206 U. S. 46; 27 Sup. Ct. Rep. 655; 51 L. ed. 956.

<sup>22</sup> 8 Wall. 439; 19 L. ed. 498.

will not, except in the clearest cases of error, depart from the doctrine of *stare decisis*. When, however, public interests are involved, and especially where the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution, and particularly the Federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the court's repudiating or modifying its former decision.

## CHAPTER IV

### THE DIVISION OF POWERS BETWEEN THE UNITED STATES AND ITS MEMBER STATES

#### **Federal powers**

The United States Constitution serves a double purpose. It operates as an instrument to delimit the several spheres of Federal and State authority, and to provide for the organization of the Federal Government. In this chapter we shall be concerned with only the first of these two subjects. That vexed question as to the original purpose of the Constitution,—whether intended to serve as an agreement between sovereign compacting States, or as the fundamental instrument of government of a single sovereign people—it is fortunately no longer necessary to discuss. For the purpose of a treatise on the constitutional law of the United States as it exists to-day it is sufficient to describe the Constitution as a legal instrument distributing governmental powers between the Federal and State governments according to the general principle that the powers granted the Federal Government are specified, expressly or by implication, and that the remainder of the possible governmental powers “not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.”<sup>1</sup>

It will have been noticed that in speaking of the powers

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<sup>1</sup> Tenth Amendment. As will presently appear the grant of certain powers to the Federal Government does not, until they are actually exercised, prevent their exercise by the States.

possessed by the General Government, the term "delegated" is used, whereas, in speaking of the powers possessed by the States, the word "reserved" is employed. This exhibits the fundamental principle governing the division of powers between the General Government and the States according to which the former possesses only those powers that are by the Constitution granted to it, whereas the States are entitled to all powers except those expressly or by implication denied to them by the Constitution. Thus the General Government is commonly spoken of as one of enumerated and the State governments as governments of unenumerated powers. This distinction would in all probability have been recognized and adopted by the Supreme Court as a logical corollary from the general character of the Constitution, had there been no express direction in that instrument itself to such effect. Out of superabundant caution, however, the Tenth Amendment was adopted.

The phrase "or to the people" covers these powers which, though constitutionally exercisable by the States, for aught the Federal Constitution has to say, are by their own State Constitutions denied to their respective governments. Thus the Federal and the State Constitution differ in this important respect that the grants of the former operate to endow the General Government with powers that it would not otherwise possess, whereas the provisions of the latter in the main operate to deprive the governments which they create of powers they otherwise would possess.

Except when expressly limited,—as, for instance, where the power which is given to levy taxes is restricted by the provisions that "all duties, imposts, and excises shall be uniform throughout the United States," that "no tax or duty shall be laid on any article exported from any State," and that "no capitation or other direct tax shall

be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken,"—a power granted to Federal Government is construed to be absolute in character.

### **Express and implied powers**

Though the Federal Government is one of enumerated powers, its powers are not described in detail, and from the very beginning it has been held to possess not simply those powers that are specifically or expressly given it, but also those necessary for the proper and effective exercise of such express powers. After enumerating the various powers that Congress is to possess, the Constitution declares "[The Congress shall have power] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."<sup>2</sup> Furthermore, it will be noticed that in the Tenth Amendment, above quoted, the powers reserved to the States or to the people are not those expressly delegated to the United States, but simply those not delegated. This is significant in view of the fact that in the corresponding section in the Articles of Confederation the word "expressly" is carefully inserted.

### **Federal powers to be liberally construed**

The Constitution is in terms and general character a grant of powers—a grant from the people of the several States to the National Government, and, strictly speaking, as in all grants of power, the authority that may be exercised thereunder is to be limited to powers specifically granted or impliedly given. But whereas, in general,

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<sup>2</sup> Art. I, § 8, cl. 18.

grants of power are strictly construed as against the grantee and in favor of the reserved rights of the grantor, in the case of the Federal Constitution this principle has, it is seen, not been applied. The justification for this has been deduced from the general nature of the Constitution as an instrument of government, and from the character of the end which was sought to be obtained by its establishment. The Federal Government exists not for the benefit of those who exercise its powers, but to subserve the national interests,—political, industrial and social,—of the people who framed and adopted it. While, therefore, it is, in essential character, a grant of powers, and is to be construed as such, its terms are to be interpreted in the light of the fact that the people in adopting it desired the establishment and maintenance of an effective National Government, and therefore one endowed with powers commensurate with that end.

### **“ Necessary and proper ”**

In pursuance of the foregoing principles the Supreme Court of the United States has, from the very beginning, declared that the powers thus impliedly granted the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words “necessary and proper,” it was early held, were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere. Thus in the early case of *United States v. Fisher*, decided in 1804, Marshall declared: “It would be incorrect and would produce endless difficulties if the opinion should



be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution.”<sup>3</sup>

### **McCulloch v. Maryland**

The classic statement, however, of the scope of the “implied” powers of Congress is that made by Marshall in the opinion which he rendered in *McCulloch v. Maryland*.<sup>4</sup> In that great case the Chief Justice says: “It may with great reason be contended, that a government, entrusted with such ample powers [as is the United States] on the due execution of which the happiness and prosperity of the nation so vitally depends, must be entrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest and cannot be presumed to have been their intention, to stay and embarrass its execution by withholding the most appropriate means.”

The determination of what are appropriate means must, Marshall goes on to declare, belong to the government which is to employ them. “The government which has the right to do an act, and has imposed on it the duty of performing that act must, according to the dictates of reason, be allowed to select the means. . . .

“ . . . We think the sound construction of the Constitution must allow to the national legislature that dis-

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<sup>3</sup> 2 Cr. 358; 2 L. ed. 304.

<sup>4</sup> 4 Wh. 316; 4 L. ed. 579.

cretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Reviewing the effect of this decision it is seen that the words "and proper" as used in the phrase "necessary and proper" are not construed as declaring that a means selected by Congress shall be proper as well as necessary,—that is, indispensable,—for carrying into effect a specified power, but as qualifying and extending the force of "necessary" so as to render constitutional the selection of any means that may be appropriate, that is, which may in any way assist the General Government in the exercise of its constitutional functions. It need not be said that the question as to whether or not the means selected is the best possible means that might have been adopted, is one for Congress to answer. All that the courts have to consider in passing upon its constitutionality is as to whether it is calculated in an appreciable degree to advance the constitutional end involved.

### **Resulting powers**

The two preceding sections have shown that the doctrine of implied powers is sufficiently broad to justify the exercise by the Federal Government of powers not deduced from specific grants of authority, but from the general fact that the United States is, with reference to its own citizens and its constituent commonwealths, a fully sovereign national State, and, with reference to other States, a political power equipped with all the

power possessed by other independent States. Story in his *Commentaries* describes as "Resulting Powers" these Federal powers which result from the aggregate authority of the General Government. That Federal authority may be deduced from this general source and that it is not necessary for the Federal Government to trace back every one of its powers to some single grant of authority, was early stated by Marshall in *Cohens v. Virginia*.<sup>5</sup> In that case he said: "It is to be observed that it is not indispensable to the existence of every power claimed for the Federal Government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and to infer from them all that the power claimed has been conferred." And later in the same opinion he says: "And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power."

An excellent illustration of resulting powers are those possessed by the United States with reference to its control of foreign relations. Starting from the premise that in all that pertains to international relations the United States appears as a single sovereign nation, and that upon it rests the constitutional duty of meeting all international responsibilities, the Supreme Court has deduced corresponding Federal powers. In *Fong Yue Ting v. United States*<sup>6</sup> that court say: "The United States are a sovereign and independent nation, and are vested by the

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<sup>5</sup> 6 Wh. 264; 5 L. ed. 257.

<sup>6</sup> 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905.

Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

Thus, from this general source has been deduced the implied power of the United States to punish the counterfeiting in this country of the securities of foreign countries, the authority to annex by statute unoccupied territory, to establish in foreign countries judicial tribunals, to lease and administer foreign territory, to exclude or expel from our shores undesirable aliens, and in general to exercise by treaty or statute all those powers properly to be embraced under the term "foreign relations" which other sovereign States possess. The extent of the authority of the United States under its treaty-making powers will receive special treatment in a later chapter. It is sufficient to point out in this place that decisions of the Supreme Court have established the doctrine that in the exercise of its treaty-making powers, and fulfilling its international responsibilities, the United States may exercise regulative control over matters which are not within the legislative power of Congress and which are in general reserved to the States. In short, it may be stated as an established principle of our constitutional law that the supreme purpose of our Constitution is the establishment and maintenance of a State which shall be nationally and internationally a sovereign body, and, therefore, that all the limitations of the Constitution, express and implied, whether relating to the reserved rights of the States or to the liberties of the individual, are to be construed as subservient to this one great fact.

### **Inherent sovereign powers**

Sometimes confused with, but quite distinct from, the doctrine which ascribes to the Federal Government plenary authority in matters international, and quite different

also from the doctrine of resulting powers, is that theory which argues the possession generally by the United States of "inherent" sovereign powers—that is, powers regarded not as implied in express grants of authority whether singly or collectively considered, but as flowing directly from the simple fact of national sovereignty. The two former doctrines are fairly deducible from the doctrine of implied powers. The latter doctrine, upon the contrary, would derive Federal authority, not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.

There can be no question as to the constitutional unsoundness, as well as to the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers.<sup>7</sup>

### **Express limitations upon the Federal Government.**

The express limitations upon the powers of the Federal Government are in part limitations upon the manner of exercise of powers expressly given, as, for example, that direct taxes shall be apportioned among the several States according to their respective populations, that naturalization, bankruptcy, and tariff laws shall be uniform through-

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<sup>7</sup> *Ex parte Merryman*, Campbell's Rep. 246. The Supreme Court has never committed itself to this doctrine. It has, however, at times used language which, especially when taken out of its context, would seem to imply its correctness. See, *e. g.*, *Legal Tender Cases*, 12 Wall. 457; 20 L. ed. 287; *U. S. v. Jones*, 109 U. S. 513; 3 Sup. Ct. Rep. 346; 27 L. ed. 1015; *Church v. U. S.*, 136 U. S. 1; 10 Sup. Ct. Rep. 792, 478; *Fong Yue Ting v. U. S.*, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905. But for an explicit repudiation of the doctrine see *Kansas v. Colorado*, 206 U. S. 46; 27 Sup. Ct. Rep. 655; 51 L. ed. 956.

out the United States; and in part absolute prohibitions upon the exercise, in any manner, of the powers specified. These absolute prohibitions are to be found, in the main, in § 9 of Article I and in the first eight Amendments.

In regard to these first eight Amendments it has sometimes been said that it was only an excess of caution that required their incorporation in the Federal Constitution. Inasmuch as the United States was to have only the powers expressly or impliedly given, it has been asserted that the General Government would have been, in the absence of such express limitations, without the authority to exercise the powers that these Amendments enumerate. A consideration, however, of the construction which several of the provisions of these Amendments have received, especially during recent years, will, it is believed, make it evident that these express limitations upon the Federal Government have been of considerable importance.

### **Implied limitations upon the Federal Government**

The implied limitations upon the Federal Government are: first, those implied in the express limitations; and second, those which arise from the general nature of the American Federal State. The Constitution looks to a preservation of the several States in the administrative autonomy that is allotted to them, and from this is deduced the principle that the Federal Government may not, unless it is absolutely necessary to its own efficiency, interfere with the free operation of State governments by way either of imposing upon them the performance of duties, or of unduly restraining their freedom of action by way of taxation or otherwise.

The principles governing the deduction of implied from express limitations upon the Federal Government are the same as those applicable to the construction of implied powers.

**Exclusive and concurrent Federal powers**

The legislative powers possessed by the Federal Government may be divided into two classes; the one embracing those powers the exercise of which is exclusively vested in the General Government; the other those which, in default of Federal exercise, may be employed by the States.

Some of the powers granted by the Constitution to the General Government are expressly denied to the States. As to the exclusive character of the Federal jurisdiction over these there cannot be, of course, any question. It has, however, been often a matter difficult of determination whether or not various of the powers given to the United States, but not expressly made exclusive, or denied to the States, are so exclusively subject to Federal control that the exercise of them by the States is under no circumstances to be permitted. Shortly stated, the principle that the Supreme Court has laid down for determining this question in each particular case as it has arisen has been the following: As regards generally the powers granted to the National Government there is a difference between those which are of such a character that the exercise of them by the States would be, under any circumstances, inconsistent with the general theory or national polity of the Constitution, and those not of such a character. As regards this latter class, the Supreme Court has held that as long as Congress does not see fit to exercise them, the States may do so. Laws thus passed by the States, are, however, subject to suspension at any time by the enactment by Congress of laws governing the same subjects.<sup>8</sup>

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<sup>8</sup> *Sturges v. Crowninshield*, 4 Wh. 122, 4 L. ed. 529. By the enactment of a Federal law a State law upon the same subject is not nullified, but merely suspended. Upon the repeal of the Federal statute the State law again operates without re-enactment by the State.

## CHAPTER V

### THE FEDERAL CONTROL OF THE FORM OF STATE GOVERNMENTS

#### State autonomy

In the foregoing pages the sovereignty of the United States as opposed to, and inconsistent with, the continued sovereignty of its individual commonwealth members has been sufficiently declared. Whatever doubt there may have been upon this point before the Civil War, the result of that gigantic struggle has left no room for disagreement since, and the subsequent unequivocal assertions of the Federal courts have simply registered conclusions that no one could rationally question. Starting, then, from this fundamental fact that, looking at the matter from a purely legal point of view, the individual Commonwealths constitute self-governing but politically subordinate portions of the United States, we shall now proceed to consider the degree of autonomy secured them under the Federal Constitution. This subject may conveniently be divided into two parts. First, the degree of control that the Federal Government may constitutionally exercise over the *form* of government that the several States may establish for themselves; and, secondly, the extent to which the General Government may supervise or control the exercise by the States of those powers that are reserved to them. First, then, as to the control that may be constitutionally exercised by the United States over the forms of government of its constituent units.



Speaking generally, it may be said that, provided its government be republican in form, each State of the Union may establish such governmental organs as it sees fit, and apportion among them its executive, legislative and judicial powers according to its own judgment as to what is expedient and proper.

### **Republican form of government defined**

The Federal Constitution provides that "The United States shall guarantee to every State in this Union a republican form of government, and protect each of them against invasion; and, on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

In form, the first clause of this section would appear to be for the benefit of the States and to impose a duty upon the Federal Government, and such undoubtedly would be its effect should a foreign government attempt to impose a government of any sort whatsoever upon the people of one of the States against their will; or should a domestic revolution result in the establishment in power of a government not sanctioned by or not freely agreed to by the electorate. In fact, however, this clause was so interpreted during the reconstruction times as to give to the Federal Government for several years an almost unlimited power of control of the domestic affairs of those States that had been in rebellion against its authority.

It will be noticed that the Constitution does not itself define the term "republican form of government." It has, however, always been an accepted rule of construction that the technical and special terms used in the Constitution are to be given that meaning which they had at the time that instrument was framed. This is but reasonable, for, in default of anything to the contrary, those who drafted the Constitution are to be presumed to

have intended the words which they used to have that meaning they knew them to have. For a definition, then, of "republican government" we must discover what in 1787 such a political form was considered to be. Certainly we may say that the governments of the thirteen original States as they existed at the time the Constitution was drafted must have been considered as illustrating the republican type. Furthermore, the Constitutions of all those States which have been admitted to the Union since 1787 must be regarded as having been impliedly declared republican by Congress at the time of the giving of its assent to their entrance into the Union.

The late Judge Cooley, in his *Principles of Constitutional Law*, has perhaps defined the term as satisfactorily as anyone.<sup>1</sup> "By a republican form of government," he says, "is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy, in which the people or community as an organized whole wield the sovereign powers of government, and, on the other side, with the rule of one man as King, Emperor, Czar, or Sultan, or with that of one class of men, as an aristocracy." "In strictness," Judge Cooley goes on to say, "a republican government is by no means inconsistent with monarchical forms, for a King may be merely an hereditary or elective executive while the powers of legislation are left exclusively to a representative body freely chosen by the people. It is to be observed, however, that it is a republican form of government that is to be guaranteed; and in the light of the undoubted fact that by the Revolution it was expected and intended to throw off monarchical and aristocratic forms, there can be no question but that by a republican form of government was intended a government in which

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<sup>1</sup> Chapter XI.

not only would the people's representatives make the laws, and their agents administer them, but the people would also, directly or indirectly, choose the executive. But it would by no means follow that the whole body of people, or even the whole body of adult and competent persons, would be admitted to political privileges; and in any republican State the law must determine the qualifications for admission to the elective franchise."

In *United States v. South Carolina*,<sup>2</sup> a case decided in 1905, an *obiter* suggestion was made by the court in its majority opinion that a State by assuming control of the manufacture and distribution of certain commodities, and, especially, by acquiring and undertaking the management of public utilities, might thereby lose its republican form of government. To the suggestions thus made no great weight can be given. Whether or not a government is republican in form depends not upon the sphere of its activities, but upon the manner in which its functionaries are selected, and the degree of their legal responsibility to the people. Thus there would be no difficulty in the most socialistic of States having a government of the purest republican type.

### Constitutionality of referendum

In the courts of the States, general direct legislation (referendum) laws were in a few early cases held unconstitutional on the ground that their effect is to establish a democratic in place of a republican—that is, a representative—form of government. Thus, for example, in *Rice v. Foster*,<sup>3</sup> the court of Delaware declared: "Although the people have the power, in conformity with its provisions,

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<sup>2</sup> 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

<sup>3</sup> 4 Harrison, 479. This law involved only a local option law. Its reasoning applies, however, and has continued to be applied to general laws. As to local option laws, however, and laws establish-

to alter the Constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican form of government." And this, the court went on to declare, would in effect be done, should the electorate be given a direct legislative power.

### Decision as to *de jure* character of State governments

Precedents have established the principle that where there is a dispute in a State as to the *de jure* character of a particular organ of its government, as, for example, as to which of two individuals has been elected as chief executive, or which of two courts or legislatures is entitled to authority, the Federal Government will not ordinarily interfere, being governed by the principle that each State government has a tribunal for the decision of such contests, and that the General Government will consider itself bound by the decision which that tribunal renders, just as the Federal courts hold themselves bound by the decisions of the State courts as to the existence and, in general, the interpretation of their respective State statutes.

In two classes of cases, however, the Federal Government exercises the right to decide which of two contesting State officials or organs is to be recognized as the *de jure*

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ing local governments and equipping them with adequate powers, the case may be said to have been overruled. See Oberholtzer, *The Referendum in America*. For a general discussion of what constitutes a government republican in form, see *Luther v. Borden*, 7 How. 1; 12 L. ed. 581, a case growing out of Dorr's Rebellion in 1845 in Rhode Island. The argument of Daniel Webster who was of counsel is especially valuable. The use of this guaranty clause by the United States for the "reconstruction" of the Southern States after the Civil War is discussed in the author's *Constitutional Law*, § 80. A limited suffrage is compatible with a republican form of government. *Minor v. Happersett*, 21 Wall. 162; 22 L. ed. 627. See also *Luther v. Borden*.

authority. The first of these includes those cases in which a decision becomes necessary in order to determine a matter of direct Federal concern. Thus, for example, when each of two contesting State legislatures selects and sends Senators to Congress, it is necessary for the United States Senate to decide which of the two electing bodies is endowed with the authority to act in that behalf for the State. So, also, as in the case of *Dorr's Rebellion*, where Federal aid is needed to suppress domestic disorder, it is necessary for the President or Congress to determine which government, claiming authority, it will recognize.

The second class of cases in which the Federal Government, through its Supreme Court, will assume jurisdiction of a dispute between two parties as to who is entitled to a State office, is where a claim is made that the State laws, as applied by the State authorities in settlement of the dispute, have violated that provision of the Fourteenth Amendment which declares that no State "shall deprive any person of life, liberty or property, without due process of law," or have violated the tenth section of Article I of the Constitution of the United States, which declares that no State shall pass a law impairing the obligation of a contract.

### **Public office not a property or contract right**

The Supreme Court of the United States has held in an unqualified manner, that as between a State and an officeholder, there is no contract right possessed by the latter either to the office or to the salary attached to it, and that, therefore, in the absence of express constitutional provision otherwise, his removal from office or the abolishment of the office itself gives him no cause of action against the State.<sup>4</sup>

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<sup>4</sup> *Butler v. Pennsylvania*, 10 How. 402; 13 L. ed. 472; *Taylor v. Beckham*, 178 U. S. 548; 20 Sup. Ct. Rep. 890; 44 L. ed. 1187.

**Suits between two or more claimants to State office**

When the dispute is not one between the State and one of its officers, but between two individuals each claiming the office and its emoluments,—when, in other words, the office itself is not disturbed nor the salary changed, the question is a different one. Then, it would seem, the office has often to be treated as a piece of property of which the owner may not be deprived without due process of law even by the State itself.<sup>5</sup>

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<sup>5</sup> *Kennard v. Louisiana*, 92 U. S. 480; 23 L. ed. 478; *Foster v. Kansas*, 112 U. S. 205; 5 Sup. Ct. Rep. 8; 28 L. ed. 696; *Boyd v. Nebraska*, 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103; *Wilson v. North Carolina*, 169 U. S. 586; 18 Sup. Ct. Rep. 435; 42 L. ed. 865; *Taylor v. Beckham*, 178 U. S. 548; 20 Sup. Ct. Rep. 890; 44 L. ed. 1187.

## CHAPTER VI

### FEDERAL SUPERVISION OF STATE ACTIVITIES; THE FOURTEENTH AMENDMENT

#### **The Fourteenth Amendment**

The question now to be considered is not the maintenance of the supremacy of the Federal Government, but the protection of individuals in the enjoyment of rights and immunities guaranteed to them by the Federal Constitution.

Prior to the adoption of the Fourteenth Amendment in 1868 the laws of the individual States, so long as they related to subjects over which the States had the right of legislation, were not subject to examination in Federal courts with a view to ascertaining whether they deprived anyone of life, liberty or property without due process of law, or denied to anyone equal legal protection. The first nine Amendments to the Federal Constitution which enumerated the fundamental rights of individuals that might not be violated were, from the beginning, construed to limit not the States but only the Federal Government. Until, therefore, the Fourteenth Amendment was adopted there was, so far as the Federal Constitution was concerned, nothing to prevent the several States from enacting laws which denied to their own citizens the equal protection of the laws or deprived them of life, liberty and property, without due process of law. The only limitations laid upon the States by the Constitution were that they should enact no bills of attainder, or *ex post facto* laws, or laws impairing the obligation of con-

tracts. As a matter of fact, indeed, all of the States had by their own Constitutions taken from their legislatures the power to enact laws upon certain specified topics, and forbidden them to violate certain declared principles of justice and right. But the adoption of these constitutional limitations was purely voluntary on their part.

In 1868, however, as one of the results of the Civil War, the Fourteenth Amendment was adopted, which, after declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," goes on to provide that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For a number of years after the adoption of this Amendment it was by no means certain that the effect of the above-cited provisions would not be to endow the United States Government with additional powers so great as fundamentally to alter the very nature of the Union itself. There can be no question that the clauses of the Amendment which have been quoted were easily susceptible of an interpretation that would have given them this result, and that, at the time they were framed and adopted by Congress and ratified by the necessary number of State legislatures, there were very many persons who believed that they would, and desired that they should, work this revolutionary change in the American constitutional system.<sup>1</sup> Fortunately, however, as all

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<sup>1</sup> Cf. Flack, *The Adoption of the Fourteenth Amendment*; also dissenting opinion of Justice Field in Civil Rights Cases, 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835.



must now believe, the Supreme Court has been led to give to these words an interpretation that has robbed them of such an effect.

This the court has been able to do by the principles which it has laid down in the cases which follow.

### **The Slaughter House Cases**

The famous Slaughter House Cases,<sup>2</sup> decided in 1873, grew out of the following facts: The State of Louisiana in the exercise of its "police powers" had passed an act chartering a company, and giving to it the exclusive right to establish and maintain stock yards, landing places and slaughter houses in the city of New Orleans, and providing that all animals intended for food should be slaughtered there. The plaintiffs in the cases that have since come to be known as the "Slaughter House Cases" alleged that this act was unconstitutional as tested by the Federal Constitution on the several grounds that it was in violation of the Thirteenth Amendment in that it created an involuntary servitude upon the part of those who were compelled to resort to this privileged company; and that it was in violation of the Fourteenth Amendment in that it deprived persons of liberty and property without due process of law, denied to them the equal protection of the laws, and abridged the privileges and immunities of citizens of the United States. It is only with this last claim that we are now concerned.

As will later be seen, the Fourteenth Amendment has been construed to give to the Federal courts the power of examining whether, in the exercise of their ordinary police and other powers, the States have denied to anyone due process of law or the equality of the laws. The claim, however, that the rights and immunities which were al-

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<sup>2</sup> 16 Wall. 36; 21 L. ed. 394.

leged to have been violated by the Louisiana statute were ones coming within the meaning of the phrase "privileges or immunities of citizens of the United States" as used in the Fourteenth Amendment, raised the fundamental question whether or not, by that Amendment, the entire so-called "police powers" of the States had been placed within the direct legislative definition and control of Congress. This would have resulted from the fact that by the Amendment Congress is given authority to enforce its provisions by appropriate legislation. If, therefore, such a right as was here alleged to have been violated, could be held to be a Federal right it would be within the power of Congress to define it, and all other similar rights, and to impose penalties upon their violation, and thus to deprive the States of their entire police powers. These police powers, it is scarcely necessary to observe, cover almost the entire field of private rights, personal and proprietary, including, as they do, the general authority of the State to legislate regarding the social, economic and moral welfare of its citizens. To have granted the contention of the plaintiffs would thus have made Congress, instead of the State legislatures, the possible source of the great body of private laws by which the citizen is governed. It is, therefore, not surprising that the court in its majority opinion should have said: "We do not conceal from ourselves the great responsibility which . . . devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."

The argument of the plaintiffs which found acceptance in the opinions of the minority of the court was that the

individual as a free man and citizen of a State, had, before the adoption of the Amendment, certain fundamental rights, privileges and immunities, which were determined by State statutes and the general principles of the common law, and that by that Amendment the citizen became primarily a citizen of the United States, and only secondarily, by residence, a citizen of a particular State of the Union, and that, therefore, these fundamental rights, privileges and immunities which formerly belonged to him as a citizen of the State in which he lived now became his as a citizen of the United States, and, as such, no longer subject to abridgment by the States. Only by this interpretation, it was argued, could the clause of the Amendment which we are considering, be given any force whatever.

The majority of the court were not able to accept this construction of the Amendment which, as we have seen, would have opened such possibilities of increasing the Federal powers at the expense of those of the States. Referring to the "history of the times" in which the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, the court found in them a unity of purpose,—the protection of the freed negroes, and not an intention radically to alter the constitutional character of the Union. Attention was called to the fact that the Fourteenth Amendment implies and by its language recognizes a continuance of a distinction between Federal and State citizenship, and that from this it follows that the privileges and immunities attaching to or growing out of each are to be distinguished.

### **Federal privileges and immunities**

With reference to the question that is immediately suggested, as to what are these distinctively Federal rights which the States are not to infringe, the court say: "Hav-

ing shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution or its laws. One of these is well described in the case of *Crandall v. Nevada*.<sup>3</sup> It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign countries are conducted, to the sub-treasuries, land offices and courts of justice in the several States.' And, quoting from the language of Chief Justice Taney in another case, it is said, 'that for all the great purposes for which the Federal Government was established, we are one people, with one common country, we are all citizens of the United States,' and it is as such citizens, that their rights are supported by this court in *Crandall v. Nevada*. Another privilege of a citizen of the United States is to demand the care and protection of the Federal Govern-

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<sup>3</sup> 6 Wall. 35; 18 L. ed. 745. Cf. Cooley, *Principles of Constitutional Law*, 245.

ment over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as the other citizens of that State. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendment, and by the other clause of the Fourteenth, next to be considered."

#### **Effect of Fourteenth Amendment upon rights enumerated in first eight Amendments**

In *Ex parte Spies*<sup>4</sup> the point was urged upon the court that the privileges and immunities secured against Federal infringement by the first eight Amendments to the Federal Constitution, were, because so secured, Federal privileges and immunities, which, according to the Fourteenth Amendment, and the doctrine of the Slaughter House Cases, the States might not abridge or deny.

The court, however, found that, in fact, no right of Spies secured by the first eight Amendments had been violated, and that, therefore, it was not necessary to pass upon this constitutional point which his counsel had raised.

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<sup>4</sup> 123 U. S. 131; 8 Sup. Ct. Rep. 22; 31 L. ed. 80.

In *Maxwell v. Dow*,<sup>5</sup> however, the court found itself compelled to pass specifically upon this point. The court in its majority opinion denied the claim set up, asserting that the mere fact that a certain privilege or immunity was guaranteed against Federal infringement did not operate to make such a privilege or immunity distinctively Federal in character. With reference to the rights enumerated in the first eight Amendments, the court said: "In none are the privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of those privileges and immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against the Federal governmental powers."

In *Minor v. Happersett*<sup>6</sup> it was held that the suffrage is not a right springing from Federal citizenship. This doctrine was declared in passing upon the claim made by a woman that because of her Federal citizenship she could not constitutionally be disqualified from voting on account of her sex. In passing upon this claim the court admitted that citizenship was not dependent upon sex, but denied that the right of suffrage was necessarily attached to the status of citizenship.

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<sup>5</sup> 176 U. S. 581; 20 Sup. Ct. Rep. 448; 44 L. ed. 597. The dissenting opinion of Justice Harlan is a vigorous argument for a wider definition of Federal privileges and immunities.

<sup>6</sup> 21 Wall. 162; 22 L. ed. 627.

### Legislative power granted Congress by the Fourteenth Amendment

From the foregoing cases it appears that the clause of the Fourteenth Amendment which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," has not given to the General Government any legislative or even supervisory power which it did not possess before the Fourteenth Amendment was adopted.

In the Civil Rights Cases,<sup>7</sup> decided in 1883, the court laid down, authoritatively and finally that it is not within the legislative power of Congress to define what are the civil rights of life, liberty and property of individuals, and to affix and enforce penalties for their denial by private persons. Hence the court held unconstitutional and void those portions of the Civil Rights Act of 1875 which attempted to do this. "Individual invasion of individual rights," the court said, "is not the subject-matter of the Amendment. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment."

The importance of the doctrine declared in the Civil Rights Cases is seen when the results which would have followed from a different construction of the Amendment are considered. If the Civil Rights Act had been held appropriate for enforcing the prohibitions of that article it would have been, as the court observes, difficult to set limits to the powers of Congress. With equal authority, that body would have the right to enact a detailed code of laws for the enforcement and protection of all the rights of

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<sup>7</sup> 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835.

life, liberty and property, and itself prescribe what should constitute due process of law in every possible case.

It will have been noticed that the doctrine of the Civil Rights Cases depended in large measure upon the assertion that the prohibitions of the Fourteenth Amendment were directed exclusively against State acts, that is, acts authoritatively sanctioned by the States as such, or officially performed by their agents, and that they had no reference to the acts of private individuals. This doctrine had already been established in a line of cases prior to the Civil Rights Cases.<sup>8</sup>

Although, by the decisions in the Slaughter House and subsequent cases in the Supreme Court, the commands laid upon the States to respect Federal privileges and immunities have thus been shorn of all but declaratory significance, and the general police powers confirmed in the Commonwealths, the other prohibitions of the first section of the Fourteenth Amendment have been so construed by the Supreme Court as to give to the Federal Government a very extensive supervisory jurisdiction over State legislation which it did not possess prior to 1868. Whenever a claim has been made that a State law has worked a deprivation of life, liberty or property, without due process of law, or has resulted in a denial to any person of the equal protection of the laws, the Federal courts have assumed jur-

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<sup>8</sup> *Strauder v. West Virginia*, 100 U. S. 303; 25 L. ed. 664; *Virginia v. Rives*, 100 U. S. 313; 25 L. ed. 667; *Ex parte Virginia*, 100 U. S. 339; 25 L. ed. 676; *Logan v. U. S.*, 144 U. S. 263; 12 Sup. Ct. Rep. 617; 36 L. ed. 429; *James v. Bowman*, 190 U. S. 127; 23 Sup. Ct. Rep. 678; 47 L. ed. 979. As to the power of Congress to provide for the punishment of individuals interfering with, or conspiring to interfere with the exercise by others of rights created by or dependent upon the Federal Constitution or laws, see *Ex parte Yarbrough*, 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274; *Motes v. U. S.*, 178 U. S. 458; 20 Sup. Ct. Rep. 993; 44 L. ed. 1150. Cf. also *In re Debs*, 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.



isdiction; and, when the claim has been sustained, they have declared such statutes void. Illustrations of this Federal supervisory power will appear throughout this treatise.

### Summary

By way of résumé we may say that, as interpreted by the Supreme Court, the adoption of the Fourteenth Amendment has not brought about any fundamental change in our constitutional system. No new subjects have been brought within the sphere of direct control of the Federal Government. No new privileges and immunities of Federal citizenship have been created or recognized. To Congress has been given no new direct primary, legislative power. It has not been authorized by the Amendment to determine or define the privileges and immunities of Federal citizenship, nor to define and affirmatively to provide for the protection of the rights of life, liberty and property, nor by direct legislation to enumerate and describe the privileges which shall constitute the equal protection of the laws. The only legislative power granted to Congress by the Amendment, is the power to provide modes of relief in cases where the States have deprived individuals or corporations of life, liberty or property without due process of law, or denied to anyone within their jurisdiction the equal protection of the laws. The supervisory powers of the Federal courts have been enormously increased; as, by the Amendment, they may examine every claim of violations by States of the prohibitions laid upon them by the Amendment, and where the claim is sustained grant the necessary relief, either by the issuance of the appropriate writ, or by holding void the offending State laws. In fine, then, the Fourteenth Amendment has operated rather as a limitation upon the powers of the States than as a grant of additional powers to the General Government.

## CHAPTER VII

### INTERSTATE RELATIONS; FULL FAITH AND CREDIT CLAUSE

#### States independent of one another

In the chapters which have gone before the constitutional relations which exist between the Federal Government on the one side and the States upon the other side have been considered. In the present and next following chapters a description will be given of the relations which exist between the several States.

Except as otherwise specifically provided by the Federal Constitution, the States of the American Union, when acting within the spheres of government reserved to them, stand towards one another as independent and wholly separated States. The laws of each State have no force, and their officials have no public authority, outside of their own territorial boundaries. As to all these matters their relations *inter se* are governed by the general principles of Private International Law, or, as otherwise termed, the Conflict of Laws.

During the colonial period the judgments of the courts of the colonies were, as to one another, strictly foreign judgments. That is, they could be impeached for fraud or prejudice, and their merits re-examined. The inconvenience of this state of affairs was soon recognized, and in the Articles of Confederation it was provided that "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." The important difference between this provision and the corresponding one in the present Constitution is that now Con-

gress is given authority to fix by statute the manner in which these acts, records and proceedings shall be proved and to determine the effect that shall be given them.<sup>1</sup>

This full faith and credit clause, it is to be observed, has reference only to the States, and not to the Territories or to the District of Columbia. Therefore it has been decided that the acts of Congress, regulating the subject in so far as they have reference to the Territories and to the District of Columbia, rests for their constitutionality upon other clauses of the Constitution.<sup>2</sup>

The same reasoning that supports the power of Congress to give to judgments rendered in the District of Columbia full faith and credit in the States, is sufficient to support its power to give equal faith in the States to judgments rendered in the Territories and insular possessions of the United States, and *vice versa* as to State judgments sued upon in the Territories or in the insular possessions.

### **Federal judgments and decrees**

In numerous cases it has been held that full faith and credit is to be given to judgments of Federal courts obtained in one State or Territory when sought to be enforced in the courts of another State or Territory, or the District of Columbia. This is due to the fact that, as the Supreme Court say in *Claffin v. Houseman*,<sup>3</sup> "The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, a paramount sovereignty."

### **Full faith and credit clause applies only to civil judgments and decrees**

It seems scarcely necessary to say that the "full faith

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<sup>1</sup> For the legislation determining these matters see Acts of 1790 and 1809, and § 905, *Revised Statutes*.

<sup>2</sup> *Embry v. Palmer*, 107 U. S. 3; 2 Sup. Ct. Rep. 25; 27 L. ed. 346.

<sup>3</sup> 93 U. S. 130; 23 L. ed. 833.

and credit" clause has reference only to civil judgments. No State, it has been held, is by this provision compelled to lend its aid in the enforcement of the penal laws of another. This was definitely determined in *Wisconsin v. Pelican Insurance Co.*<sup>4</sup> That clause, and the acts of Congress under it, it is declared in that case, establish a rule of evidence rather than of jurisdiction. "While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged, they do not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for a fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. In the words of Justice Story . . . 'the Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It does not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.'"

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<sup>4</sup> 127 U. S. 265; 8 Sup. Ct. Rep. 1370; 32 L. ed. 239.

As being simply evidence, judgments of the courts of one State, when sued upon in another State, are subject, as regards procedure and remedies, to the laws of the latter State. For example, the statute of limitations of the State where suit is brought is applied even though it provides a shorter term of years than that existing in the State in which the judgment was originally obtained.

It has been held in numerous cases that each State of the Union may enforce in its own courts which have jurisdiction of the parties and subject-matter, civil rights of action depending solely upon the statutes of another State, provided there be no local policy of the forum inconsistent therewith.<sup>5</sup> These cases do not, however, come under the operation of the full faith and credit clause.

### Judgments in rem and in personam

The validity of judgments or decrees in States other than those in which they are obtained depends solely upon the court which rendered them having obtained jurisdiction. In order to obtain jurisdiction in actions *in rem*, the *res* must be located in the State. In all actions service of notice of the commencement of the suit must be had upon the defendants. In actions *in rem* this service need not be actual, but may be constructive, that is, by publication. In actions *in personam*, however, actual service is required. Mere constructive service will not warrant a personal judgment or decree which may be sued upon in another jurisdiction.<sup>6</sup>

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<sup>5</sup> *Dennick v. Central R. R. Co.*, 103 U. S. 11; 26 L. ed. 439; *Slater v. Mexican National R. R. Co.*, 194 U. S. 120; 24 Sup. Ct. Rep. 581; 48 L. ed. 900; *Atchison, etc., R. R. Co. v. Sowers*, 213 U. S. 55; 29 Sup. Ct. Rep. 397; 53 L. ed. 695.

<sup>6</sup> *Pennoyer v. Neff*, 95 U. S. 714; 24 L. ed. 565; *Fall v. Easton*, 215 U. S. 1; 30 Sup. Ct. Rep. 3; 54 L. ed. 1. As to whether the court in

### Marriage and divorce

The force and meaning of the "full faith and credit" clause of the Constitution has been especially worked out with reference to the subject of marriage and divorce and it will, therefore, be proper to state briefly the position that the Supreme Court has taken upon this point.

Generally speaking, it has been held that jurisdiction to grant a divorce depends upon the domicile of the complainant or of the defendant. With hardly an exception, all of the States of the Union recognize the possibility of the wife obtaining a domicile separate from that of her husband. Until recently, however, a few States (among them New York) held that where the husband and wife were domiciled in different States, decrees of divorce granted in either State would not have to be given full faith and credit in the other States. The unconstitutionality of this doctrine was, however, declared by the United States Supreme Court in *Atherton v. Atherton*.<sup>7</sup>

One State of the Union is, of course, not obliged to recognize the validity of a divorce granted by a court of another State unless that State had jurisdiction to grant it,—a jurisdiction, which, as just said, is held to depend upon the domicile of one or both of the parties. No valid decree of divorce can, therefore, be granted, on constructive service, by the courts of a State in which neither party is domiciled.<sup>8</sup>

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which suit is brought upon a judgment obtained in another State of the Union may examine the facts upon which that judgment was based, and refuse to it full faith and credit if found to be based upon facts such as would not support a legal claim under the law of the State in which enforcement is sought. See *Fauntleroy v. Lum*, 210 U. S. 230; 28 Sup. Ct. Rep. 641; 52 L. ed. 1039. See also *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373; 24 Sup. Ct. Rep. 92; 48 L. ed. 225; and *Bonaparte v. Tax Court*, 104 U. S. 592; 26 L. ed. 845.

<sup>7</sup> 181 U. S. 155; 21 Sup. Ct. Rep. 544; 45 L. ed. 794.

<sup>8</sup> *Bell v. Bell*, 181 U. S. 175; 21 Sup. Ct. Rep. 551; 45 L. ed. 804.

Where the plaintiff has not a *bona fide* domicile in the State, a court cannot render a decree binding in other States even if the non-resident defendant voluntarily enters a personal appearance.<sup>9</sup> Of course, however, there is nothing to prevent courts of one State from recognizing, if they see fit, a decree thus granted in another State. The provision of the Federal Constitution is brought into force only when State courts refuse to grant full faith and credit.<sup>10</sup>

Finally it should be said that in all cases where the defendant has not been summoned within the State, or has not voluntarily appeared, the decree that is rendered has no extraterritorial force except as dissolving the matrimonial status. It cannot settle in an extraterritorial manner questions of property rights, custody of children and the payment of alimony.

Until the decision in 1906 of *Haddock v. Haddock*,<sup>11</sup> it had been supposed that a decree of divorce granted the husband or wife by a court of the State in which he or she was domiciled, if the notice of the beginning of the suit required by the local law had been served actually or constructively upon the other party, was in all cases valid in other States. This, it has been thought, had been determined in *Atherton v. Atherton*. In the *Haddock* case, however, the Supreme Court held that a State court was not obligated to recognize a divorce obtained in another State which was the then domicile of the husband, who was the complainant, when the wife had continued to reside in another State which was the original matrimonial domicile, and had received only constructive notice.

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<sup>9</sup> *Andrews v. Andrews*, 188 U. S. 14; 23 Sup. Ct. Rep. 237; 47 L. ed. 366.

<sup>10</sup> *Lynde v. Lynde*, 181 U. S. 183; 21 Sup. Ct. Rep. 555; 45 L. ed. 810.

<sup>11</sup> 201 U. S. 562; 26 Sup. Ct. Rep. 525; 50 L. ed. 867.

In effect, the court held that a suit for divorce is essentially an action *in personam*; that, where, as in the case at bar, the husband had wrongfully deserted his wife she could retain her domicile separate from that of her husband, and that, therefore, the decree rendered without personal service upon her need not be recognized outside of the State where pronounced. In result, the law would then seem to be that, in order to render a decree of divorce which must be recognized by the courts of the other States, a court must have jurisdiction of both parties—of the complainant by a *bona fide* residence creating a domicile, and of the defendant either by domicile in the State, by personal service, or actual appearance, or by constructive service. But that this constructive service cannot be relied upon in cases wherein the defendant having had good reason for separating from the complainant, has obtained or retained a domicile in another State. It is to be confessed, however, that the law upon this subject has been unsettled by the Haddock case, so that a certain statement of its status is difficult if not impossible.<sup>12</sup>

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<sup>12</sup> See *Harvard Law Review*, XIX, 586; and the *Greenbag*, XVIII, 348.



## CHAPTER VIII

### INTERSTATE RELATIONS; THE COMITY CLAUSE

#### **Privileges and immunities**

Article IV, § 2 of the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This provision has for its general aim the prevention of arbitrary and vexatious discriminations by the several States in favor of their own citizens and against the citizens of other States. "It was undoubtedly the object of the clause in question," say the Supreme Court in *Paul v. Virginia*,<sup>1</sup> "to place the citizens of each State upon the same footing with citizens of other States, as far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress in other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind, removing from the citizens of each State the disabilities

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<sup>1</sup> 8 Wall. 168; 19 L. ed. 357.

of alienage in the other, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." <sup>2</sup>

### Political privileges

The interstate comity clause of the Federal Constitution does not compel the several States to grant to resident citizens of the other States immediately upon their entrance into the State the political privileges extended to their own citizens. This the Supreme Court has held from the very beginning and has recently reaffirmed in the case of *Blake v. McClung*.<sup>3</sup>

Finally, it is to be said, the several States may impose upon non-residents such special limitations and obligations as are, in aim and effect, not discriminative but reasonably necessary for the protection of their own citizens from fraud, disease or injury of any sort. Thus, as an example, though the citizens of other States may not be forbidden to sue in the courts of the State, they may be required to give bonds for costs not exacted of residents.<sup>4</sup>

In *McCreedy v. Virginia* <sup>5</sup> the important limitation of the clause was established that a citizen of one State is not, of constitutional right, entitled to share upon equal terms with the citizens of another State those proprietary interests which may be said to belong generally to that

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<sup>2</sup> The courts have never attempted a complete list of the privileges and immunities guaranteed by this clause, but for partial enumerations see *Corfield v. Coryell*, 4 Wash. C. C. 371; and *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449. See also two articles by W. J. Meyers in *Michigan Law Review*, I, 286, 364, entitled "The Privileges and Immunities of Citizens in the Several States."

<sup>3</sup> 172 U. S. 239; 19 Sup. Ct. Rep. 165; 43 L. ed. 432.

<sup>4</sup> *Chemung Canal Bank v. Lowery*, 93 U. S. 72; 23 L. ed. 806.

<sup>5</sup> 94 U. S. 391; 24 L. ed. 248.

State as such. This case involved the right of cultivating oysters on beds of the tide waters of the State. The court in its opinion say: "We think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State."

### **Privileges of one State not carried into other States**

The comity clause does not entitle a citizen within his own State to privileges and immunities which may be granted by other States to their citizens. In other words, it does not require that when a right is granted by any one of the States of the Union to its citizens, it thereby becomes a right which all the other States must grant to their citizens.

It also scarcely needs argument that under this special privileges clause a citizen of one State residing, or having legal interests in another State, may not lay claim to privileges and immunities which his own State grants him, but which the other State does not grant to its citizens.<sup>6</sup>

### **Corporations not citizens within the meaning of the comity clause**

In *Paul v. Virginia* the doctrine, never since questioned, was laid down that a corporation is not a citizen within the meaning of the term as used in the comity clause. Inasmuch as a corporation is the mere creation of local law, the court declare that it can have no legal existence, or right to do business, beyond the limits of the sovereignty by which it was created. In other words, the interstate comity clause of the Federal Constitution does not necessitate the recognition by the several States of corporations

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Paul v. Virginia, 8 Wall. 168; 19 L. ed. 357.

created by any of the other States. "Having no absolute right of recognition in other States," the court say, "but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such securities for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The principle of State omnipotence when dealing with the corporations of other States is, however, limited in three very important respects. In so far as such corporations are engaged in the conduct of interstate commerce they may not be controlled, the regulation of this subject being exclusively a Federal concern; they may not be deprived of property without due process of law or denied the equal protection of the laws; and the obligations of contracts entered into by them may not be impaired.<sup>7</sup>

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<sup>7</sup> See, for example, *Blake v. McClung*, 172 U. S. 239; 19 Sup. Ct. Rep. 165; 43 L. ed. 432, and authorities there cited. Also, *Sully v. Am. National Bank*, 178 U. S. 289; 20 Sup. Ct. Rep. 935; 44 L. ed. 1072; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; 20 Sup. Ct. Rep. 518; 44 L. ed. 657; *W. U. Tel. Co. v. Kansas*, 216 U. S. 1; 30 Sup. Ct. Rep. 190; 54 L. ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56; 30 Sup. Ct. Rep. 232; 54 L. ed. 56.

## CHAPTER IX

### INTERSTATE RELATIONS: EXTRADITION

#### **Interstate extradition**

The Constitution provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he has fled, be delivered up to be removed to the State having jurisdiction of the crime" (Art. IV, § 2, cl. 2).

In the case of *Kentucky v. Dennison*,<sup>1</sup> decided by the Supreme Court in 1860, the respective powers and duties of the State and Federal Governments in respect of the extradition of criminals came up for adjudication. Congress had passed a law declaring that, upon request from the State from which the fugitive has fled, "it shall be the duty of the executive authority of the State" to cause the fugitive to be seized and delivered to the agent of the demanding State. Dennison, the governor of Ohio, refused the request of the Commonwealth of Kentucky to surrender a fugitive from her borders. Thereupon a mandamus was asked from the Federal court to compel him to do so. This writ, the Supreme Court in a unanimous opinion refused to issue, the position being taken that the obligation imposed upon the governors of the State by the extradition clause is not one which may be enforced by Federal authority.

There have since been a number of occasions upon which

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<sup>1</sup> 24 How. 66; 16 L. ed. 717.

the governor of one State has refused the extradition of a person found within its borders and admittedly come from the State which has asked for his return. A notable instance was the refusal of the governor of Indiana to permit the extradition of ex-Governor Taylor of Kentucky who was indicted in the latter State as having been a party to the murder of Governor Goebel.

### **Extradition by the States of the Union to foreign States**

In 1840 the Supreme Court was called upon to pass upon the question whether it lies within the constitutional power of the individual States of the Union to surrender fugitives from justice to a foreign government.<sup>2</sup> This point the court found so difficult to decide, that, after holding it under advisement for a long time, it divided equally and was, therefore, unable to render an opinion as the opinion of the court, though, according to its practice in such cases, it affirmed the decision of the court below. Taney in his individual opinion took the ground that the surrender of fugitives from justice is a matter that properly falls within the general field of international relations, and that the control of this field being exclusively vested in the Federal Government, the States are absolutely excluded therefrom, and, therefore, cannot, constitutionally, exercise the right of extraditing to foreign countries fugitives from such countries to their own territories.

It would seem that the law on this point remained in this unsettled state until 1886 when, in the case of *United States v. Rauscher* <sup>3</sup> the Supreme Court declared, without dissent, that "there can be little doubt of the soundness of the opinion of Chief Justice Taney, that the power

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<sup>2</sup> *Holmes v. Jennison*, 14 Pet. 540; 10 L. ed. 579.

<sup>3</sup> 119 U. S. 407; 7 Sup. Ct. Rep. 234; 30 L. ed. 425.

exercised by the governor of Vermont is a part of the foreign intercourse of this country which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers."

A number of decisions have held that the asylum State may satisfy the demands of its own laws before surrendering a fugitive to the State from which he has fled.<sup>4</sup>

### **Auxiliary legislation by the States**

The power of Congress, by legislation to render effective the extradition clause is not exclusive, and does not, therefore, exclude the power of the State to enact measures auxiliary thereto. Indeed, such additional legislation is, in general, necessary, as, for example, laws for inquiring into the fact whether the person demanded was actually, and not constructively, within the State claiming him, when the offense charged was committed.<sup>5</sup>

### **Judicial examination of extradition proceedings**

"Upon the executive of the State rests the responsibility of determining, in some legal mode, whether [the one claimed] is a fugitive of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State." <sup>6</sup>

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<sup>4</sup> Taylor v. Taintor, 16 Wall. 366; 21 L. ed. 287.

<sup>5</sup> *Ex parte McKean*, 3 Hughes, 23. See also 3 Fed. Stat. Annotated, 79, note.

<sup>6</sup> *Ex parte Reggel*, 114 U. S. 642; 5 Sup. Ct. Rep. 1148; 29 L. ed. 250. Independent proof, apart from the requisition papers that the accused is a fugitive from justice need not, however, be demanded

The governor cannot be compelled by judicial process, State or Federal, to take action, but where he has acted, his action may be reviewed by the courts.<sup>7</sup>

It has been decided that where a fugitive has been forcibly abducted, without being extradited, from a State to which he had come to the State from which he had fled, neither the Federal Government, nor the State whose peace has thus been violated, nor the abducted one, has legal redress, unless, indeed, the governor of the State to which he has been taken is willing to return him, and to extradite the persons participating in the abduction.<sup>8</sup>

It has also been held that no Federal right of the fugitive has been violated when he has been removed to the demanding State without an opportunity being given to test in the courts of the surrendering State the legality of the extradition.<sup>9</sup>

#### **Trial of offenses other than those for which extradited**

In *United States v. Rauscher* was considered the question whether a fugitive extradited from a foreign country in pursuance of a treaty between that country and the United States covering the crime charged, could, after coming into the custody of the United States, be tried upon another minor offense not covered by the treaty. The court held that he could not be.

In *Lascelles v. Georgia*,<sup>10</sup> however, it was held that,

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by the governor upon whom the request for surrender is made. *Pettibone v. Nichols*, 203 U. S. 192; 27 Sup. Ct. Rep. 111; 51 L. ed. 148.

<sup>7</sup> *Roberts v. Reilly*, 116 U. S. 80; 6 Sup. Ct. Rep. 291; 29 L. ed. 544.

<sup>8</sup> *Mahon v. Justice*, 127 U. S. 700; 8 Sup. Ct. Rep. 1204; 32 L. ed. 283.

<sup>9</sup> *Pettibone v. Nichols*, 203 U. S. 192; 27 Sup. Ct. Rep. 111; 51 L. ed. 148.

<sup>10</sup> 148 U. S. 537; 13 Sup. Ct. Rep. 687; 37 L. ed. 549. See also the authorities cited in this case.



as to fugitives from one State of the Union to another, this may be done.

### Who is a "fugitive"

"To be a fugitive from justice . . . it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found to be within the territory of another." <sup>11</sup>

In *Hyatt v. New York*,<sup>12</sup> it was definitely held, without qualification, that in order to be a "fugitive from justice" within the meaning of the constitutional clause, and of the statutes relating thereto, the person sought to be extradited must have been actually, and not merely constructively, within the demanding State at the time the crime charged was committed. Furthermore, in this case it was held that one who came into the State on business for a single day eight days after the alleged commission of the crime, and months before indictment found, was not, by his departure therefrom, brought within the terms of the statute providing for extradition.

### Fugitive slaves

This clause is practically obsolete. An elaborate examination of the obligations imposed upon the States, and of the extent of their concurrent legislative power in the premises is found in *Prigg v. Pennsylvania*.<sup>13</sup>

<sup>11</sup> *Roberts v. Reilly*, 116 U. S. 80; 6 Sup. Ct. Rep. 291; 29 L. ed. 544. See also *Appleyard v. Massachusetts*, 203 U. S. 222; 27 Sup. Ct. Rep. 122; 51 L. ed. 161.

<sup>12</sup> 188 U. S. 691; 23 Sup. Ct. Rep. 456; 47 L. ed. 657.

<sup>13</sup> 16 Pet. 539; 10 L. ed. 1060.

## CHAPTER X

### INTERSTATE RELATIONS: COMPACTS BETWEEN THE STATES, AND BETWEEN THE UNITED STATES AND THE STATES

#### **Compacts between the States**

The control of international relations being exclusively vested in the Federal Government, it necessarily follows that the several States have no authority to enter into any diplomatic or political relations with foreign powers. Nevertheless, from an excess of caution, the Federal Constitution declares that "No State shall enter into any treaty, alliance, or confederation," and that, "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power."

It will be noticed that in the latter of these two constitutional clauses, the qualification "without the consent of Congress" is introduced. There has, therefore, never been any doubt that, when this congressional consent is given, the several States of the American Union may enter into agreements and compacts with one another, so long as their effect is not to create what in political language is termed an "alliance" or "Confederation." Not only this; it has been held that there are a variety of subjects concerning which the several States may enter into agreements with one another without obtaining the consent of Congress.<sup>1</sup>

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<sup>1</sup> See the language of the court in *Virginia v. Tennessee*, 148 U. S. 503; 13 Sup. Ct. Rep. 728; 37 L. ed. 537.

### Compact between the States and the United States

Closely connected with the subject of compacts of the States, *inter se*, is that of compacts between the individual States and the United States.

Of compacts of this character which have been entered into, the greater number have been made at the time the States in question have been admitted as States into the Union, and have attempted to place such States under restrictions not directly deducible from the Federal Constitution, and therefore, restrictions not resting upon the other States. To this extent they have been in violation of the general principle of the equality of the States.

↳ This principle, it may be said, is not expressly stated in the Federal Constitution, but would seem to be implied in the general nature of that instrument.<sup>2</sup>

The Constitution, without distinguishing between the original and new States, defines the political privileges which the States are to enjoy, and declares that all powers not granted to the United States shall be considered as reserved "to the States." From this it almost irresistibly follows that Congress has not the right to provide that certain members of the Union, possessing full statehood, shall have constitutional competences less than those of their sister States. According to this, then, though Congress may exact of Territories whatever conditions it sees fit as requirements precedent to their admission as States, when admitted as such, it cannot deny to them any of the privileges and immunities which the other commonwealths enjoy.

It would seem, as regards the enforceability of these contracts, that a distinction is to be made between those that attempt to place the State under political restrictions not imposed upon all the States of the Union by the Fed-

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<sup>2</sup> See *Political Science Quarterly*, III, 425, article by W. A. Dunning, "Are the States Equal Under the Constitution?"

eral Constitution, and those which seek the future regulation of private, proprietary interests, and that these latter, though not the former, may be enforced after the States have been admitted into the Union.<sup>3</sup>

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<sup>3</sup> *Escanaba v. Lake Michigan Transportation Co.*, 107 U. S. 678; 2 Sup. Ct. Rep. 185; 27 L. ed. 442; *Boln v. Nebraska*, 176 U. S. 83; 20 Sup. Ct. Rep. 287; 44 L. ed. 382; *Stearns v. Minnesota*, 179 U. S. 223; 21 Sup. Ct. Rep. 73; 45 L. ed. 162.

## CHAPTER XI

### THE PERSONS SUBJECT TO THE JURISDICTION OF THE UNITED STATES: STATUS OF ALIENS

#### **Territorial sovereignty**

By international law and by the public law of all civilized States the legal jurisdiction of a State is recognized to extend over all persons for the time being within the districts under its *de facto* control. The only exceptions, if exceptions they be, are those coming within the principle of extraterritoriality. A State has jurisdiction over not only its native-born and naturalized subjects, but all the subjects of other States permanently or, at any given time, temporarily resident, within its borders.<sup>1</sup>

#### **Status of aliens**

As regards the status of aliens, that is, citizens of other States, who are temporarily or permanently domiciled within a State, it may be said that the fact that they are within its territorial limits makes them, in a broad constitutional sense, members of that State and, therefore, subject to the authority of its laws, though they still remain the subjects or citizens of their native States. In fact, being under the protection of the State where they are, they owe an allegiance to it according to the maxim *protectio trahit subjectionem, et subjectionio protectionem*.<sup>2</sup>

<sup>1</sup> For a general discussion of the principle of territorial sovereignty, see the case of *The Exchange*, 7 Cr. 116; 3 L. ed. 287. For the effects of *de facto* control, see *United States v. Rice*, 4 Wh. 246; 4 L. ed. 562.

<sup>2</sup> Cf. Webster's report on *Thrasher's Case*, *Works*, VI, 526. See,

It has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, and over its own citizens wherever they may be. In the exercise, however, of this authority over persons within its territorial limits who are claimed as citizens by other States, that is, over resident aliens, or naturalized citizens whose native States do not recognize the right of expatriation, this legal power, though not subject to legal limitation, is actually subject to certain limitations which international custom has created. Thus each State demands that its citizens when abroad, shall receive protection of life and property, and that they be not unduly discriminated against by the foreign State in which they may happen to be. Also, States do not permit the foreign States to require from their subjects the performance of duties, as, for example, service in its army, that may properly be required only of citizens. Resident aliens may indeed be required to lend their assistance, by service in the militia and police forces, or in a *posse comitatus*, to put down domestic disorder; for, enjoying the protection of the local law, they may fairly be required to aid in overcoming resistance to its enforcement. But they may not be compelled to serve in the national military forces in cases of public war.

A distinction is made in practically all countries between domiciled and non-domiciled aliens, with reference to the legal burdens that may be imposed upon them and the civil and political rights that they may enjoy.

An alien becomes domiciled in a particular place when he takes up his residence there with an intention to remain for an indefinite length of time (*animo manendi*). When so domiciled, all matters other than political, which re-

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also, *United States v. Carlisle*, 16 Wall. 147; 21 L. ed. 426; *United States v. Wong Kim Ark*, 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890.

late to his personal status, are regulated by the *lex domicilii*. Thus the local law governs his power to enter into contracts, regulates succession to personal property, and the validity of wills with reference thereto, and, in the United States, England, and many of her dependencies, determines the validity of marriages.

Domicile is immediately fixed when residence is taken up with the intent to remain for an indefinite time.<sup>3</sup>

An alien passing through the United States, or for any purpose only temporarily in the country, is held fully subject to local criminal law. He is also able to enter into civil contracts which may be enforced against him to the extent of any property that he may have within the United States.

#### **Exclusion and expulsion of aliens**

All countries have, according to the principles of international law, the right to determine for themselves whether or not they will admit aliens within their borders, or whether they will admit some and exclude others. Furthermore, after admission, aliens, whether domiciled or not, may remain only so long as the State where they are may see fit to permit them to do so. The arbitrary, oppressive, or opprobrious exercise of these rights may give rise to just ground of complaint upon the part of the States whose subjects are thereby injured or discriminated against. But the existence of the right of an independent State to determine for itself whom it will receive or allow to remain within its borders, cannot be questioned.

The right of the United States, from both the international and constitutional points of view, to prohibit entrance within its borders of such aliens as it may deem undesirable additions to its population, has been examined and upheld in numerous cases, most of them dealing with the exclusion of the Chinese.<sup>4</sup>

<sup>3</sup> *The Venus*, 8 Cr. 253; 3 L. ed. 553.

<sup>4</sup> *Chae Chan Ping v. United States*, 130 U. S. 581; 9 Sup. Ct. Rep.

**Protection of the persons and property of aliens**

Aliens are, by the general doctrines of public law, entitled to the same protection of persons and property that is enjoyed by the citizens of the State in which they are resident. In all cases, when injured, the same means of redress that are open to citizens must be given to them. But they are, of international right, entitled to no special privileges in these respects.<sup>5</sup>

623; 32 L. ed. 1068. That this power of exclusion may be exercised through administrative officers without judicial intervention, see Chapter LIV of this treatise. The leading cases are: *Ekiu v. United States*, 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905; *Lem Moon Sing v. United States*, 158 U. S. 538; 15 Sup. Ct. Rep. 967; 39 L. ed. 1082; *Turner v. Williams*, 194 U. S. 279; 24 Sup. Ct. Rep. 719; 48 L. ed. 979; *United States v. Ju Toy*, 198 U. S. 253; 25 Sup. Ct. Rep. 644; 49 L. ed. 1040; *Chin Low v. United States*, 208 U. S. 8; 28 Sup. Ct. Rep. 201; 52 L. ed. 369.

<sup>5</sup> See Moore, *Digest of International Law*, IV, 534, and authorities there cited. For a discussion of the constitutional and international questions arising out of injuries to resident aliens, see the author's larger treatise, § 126, and also the monograph by J. I. Chamberlain, *The Position of the Federal Government of the United States in Regard to Crimes Committed Against Subjects of a Foreign Nation Within the States*.



## CHAPTER XII

### AMERICAN CITIZENSHIP

#### **Citizenship defined**

The citizen or subject body of a State, regarded from the point of view of other States, that is, from the point of view of international law, constitutes one homogeneous body, all the members of which have the same status, the same rights and duties. Considered, however, from the point of view of the constitutional or municipal law of the State in question, they may be grouped into distinct classes, with differing public and private rights. Thus it is that in the constitutional jurisprudence of the United States are to be found at present not only a distinction between Federal and State citizenship, but, within the class of Federal citizenship (as including all those persons subject to the full sovereignty of the United States) a distinction between those who are "citizens of the United States" according to the meaning of the phrase as used in the Constitution of the United States, and those, who, though subjects of the United States, are not citizens within this narrower constitutional sense.<sup>1</sup>

#### **State and Federal citizenship distinguished**

As adopted, the Federal Constitution contained no definition of citizenship. Impliedly, however, it recog-

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<sup>1</sup> In the opinions rendered in the case of *Minor v. Happersett*, 21 Wall. 162; 22 L. ed. 627, is to be found a general discussion of the subject of citizenship. See also a valuable congressional report on citizenship, H. R. Doc. 326, 59th Cong., 2d Session.

nized a State citizenship in that clause which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It would also seem to have recognized a Federal citizenship in the clauses providing that the President shall be "a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution"; that Senators and Representatives shall have been nine and seven years respectively citizens "of the United States"; and that Congress shall have the power to pass laws regulating the naturalization of aliens.

There has never been any question as to the existence under the Constitution of a distinction between State and Federal citizenship. The only dispute has been as to the relationship of the two. Prior to the argument of the *Dred Scott* case<sup>2</sup> there was surprisingly little discussion of this point. The opinion generally held seems, however, to have been that every citizen of a State was a citizen of the United States.

In effect, the *Dred Scott* decision held that native-born negroes, whether free or slave, living in the United States, though subjects of, that is, owing allegiance to, the United States, were not, and could not by either State or Federal action, be made "citizens" of the United States within the meaning of the Constitution.

### **The Fourteenth Amendment**

In 1868 was adopted the Fourteenth Amendment which provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The two main purposes of this declaration undoubtedly

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<sup>2</sup> *Scott v. Sandford*, 19 How. 393; 15 L. ed. 691.

were: (1) The assertion that national citizenship is primary and paramount to State citizenship, and (2), the granting of both national and State citizenship to the negro. That national citizenship was to be paramount was shown not only in the words just quoted, but in the further provision of the amendment that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the Slaughter House Cases,<sup>3</sup> as we have already learned, the Supreme Court held, in effect, that this amendment did not have the effect of absorbing State citizenship and its appurtenant rights into the national citizenship, but that the two remain as distinct as before. Upon this point the court declare that the clause defining citizenship provides that "persons may be citizens of the United States without regard to the citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States."

Since the adoption of the Fourteenth Amendment there has been no question that all persons (including negroes) born or naturalized in the United States become by mere residence in a State citizens of the State. Furthermore there is, and has been, no question that, as Taney says in his opinion in the Dred Scott case, a State cannot, by granting its citizenship to an alien, give him Federal citizenship or endow him with any of the privileges appertaining to that status, for the right of naturalization is, as will be seen, vested exclusively in the Federal Government.

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<sup>3</sup> 16 Wall. 36; 21 L. ed. 394.

Inhabitants of the District of Columbia and of a Territory are not citizens of a State within the meaning of the Constitution. They are, however, of course, citizens of the United States.<sup>4</sup>

### Wong Kim Ark case

In the case of *United States v. Wong Kim Ark*,<sup>5</sup> decided in 1898, the Supreme Court was called upon to determine whether, under the terms of the Fourteenth Amendment, persons born in the United States of alien parents, are citizens of the United States. In this case the question was as to the citizenship of a child of Chinese parents who not only were not citizens of the United States, but could not, under the existing laws, become such by naturalization. In sustaining Ark's citizenship the court held that the clause of the Amendment declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," is but declaratory of the common-law principle unreservedly accepted in England since Calvin's case (the case of Postnati, decided in 1608) and in the United States since the Declaration of Independence, that all persons, irrespective of the nationality of their parents, born within the territorial limits of a State, are, *ipso facto*, citizens of that State. The court admitted that the principle of the Roman law according to which the citizenship follows that of the parent, irrespective of the place of birth, has been accepted by certain of the European nations, but denied that this principle had become a true and universal rule of international law, or, if it had, that it had superseded the rule of the common law.

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<sup>4</sup> *Hepburn v. Ellzey*, 2 Cr. 445; 2 L. ed. 332; *American Insurance Co. v. Canter*, 1 Pet. 511; 7 L. ed. 242.

<sup>5</sup> 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890.

The acceptance of the foregoing doctrine, it was held, does not prevent the United States from providing that children born abroad of American citizens shall be considered citizens of the United States.

## CHAPTER XIII

### NATURALIZATION: EXPATRIATION

#### **Naturalization by statute**

Each country determines, by its own municipal law, the persons to be admitted to its citizenship.

Since the adoption of the Constitution, it has been recognized that citizenship of the United States may be obtained in two ways—by birth within the country, and by naturalization. As has been already learned, up to the time of the Dred Scott decision there was doubt whether birth within the United States or naturalization by the General Government was sufficient to endow one with either Federal or State citizenship. By that decision this doubt was resolved in the negative, it being held that no one by mere birth becomes a citizen of the United States, and that one could become a Federal citizen only by becoming first a citizen of a State, though it was also held, it will be remembered, that a State could not, by making an African negro one of its own citizens, thereby endow him with the general constitutional privileges of Federal citizenship. By the Fourteenth Amendment, however, it was declared that national citizenship is no longer dependent upon State citizenship, and that mere birth within the United States, even though of alien parents, or naturalization by Federal law, is sufficient to create national citizenship; and that residence in a State is sufficient to render one a citizen of that State.

It lies within the legislative discretion of Congress to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of

persons to whom the right will be extended; but, as was said in the *Wong Kim Ark* case, not to restrict the civil and political rights of naturalized citizens beyond the limits provided in the Constitution.

Except as limited by the Constitution it is within the power of Congress to determine the civil and political rights which naturalized citizens shall enjoy, and to make these rights less than those possessed by native-born subjects. The due process of law clause of the Fifth Amendment, however, would prevent any very great discrimination as to their civil rights, and this limitation is reinforced by the obligations of international comity. The Constitution itself provides that only a native-born citizen shall be eligible to the Presidency or Vice Presidency.

In the United States the granting of naturalization is held to be a judicial act.<sup>1</sup>

Congress by statute determines the courts which shall exercise the right to naturalize, and to such courts the function is exclusively confined. Congress may authorize, and for many years has authorized, State courts to entertain naturalization proceedings, but there is, of course, no power on the part of the Federal Government to compel the exercise by such State courts of the power so granted.

It has been held that naturalization has a retroactive effect to the extent of removing liability to forfeiture of lands held during alienage.<sup>2</sup>

The naturalization of a father operates as a naturalization of his minor children if they are dwelling within the United States.<sup>3</sup> In the same case in which this is held, it is also held that the declaration by a father of an inten-

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<sup>1</sup> *Spratt v. Spratt*, 4 Pet. 393; 7 L. ed. 897.

<sup>2</sup> *Manuel v. Wulff*, 152 U. S. 505; 14 Sup. Ct. Rep. 651; 38 L. ed. 532.

<sup>3</sup> *Boyd v. Nebraska*, 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

tion to become naturalized gives to his children who attain their majority, before their father's naturalization is completed, an inchoate citizenship which, however, upon majority, may be repudiated.

When territories are annexed either by treaty or by conquest, the status of the inhabitants is determined at the will of the annexing States. In all cases, however, in the absence of any treaty stipulations to the contrary, the annexation of a territory transfers to the annexing State the allegiance of its inhabitants, and makes them, from the point of view of other nations, the citizens of that State. Whether or not, however, they become its citizens in the strictest constitutional sense depends upon the municipal will of that country. This branch of the subject will be treated in the chapter dealing with "Citizenship in the Territories and Dependencies."

Besides naturalization by general acts, by treaty, and by conquest, there have been many instances in the United States of naturalization of specific individuals or groups of individuals by special acts of Congress.<sup>4</sup>

By statute it is provided that "all children heretofore born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States."<sup>5</sup> The application of this principle to persons born in countries which, like the United States, claim as their own citizens all persons born within their limits, is to create a double citizenship. This is true, especially, of course, with reference to England.

Double citizenship is also created in those cases in

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<sup>4</sup> See Van Dyne, *Citizenship of the United States*, Chapter VI.

<sup>5</sup> Rev. Stat., § 1993.



which one country naturalizes citizens of another country which does not admit the right of the individual to expatriate himself without the consent of the State of his natural allegiance.

The difficulties and conflicting claims arising out of these cases of double allegiance have been numerous, and have usually been settled, each case upon its own merits, by way of compromise and upon doctrines of comity, rather than by the establishment of any very general principles. Thus it has been held upon numerous occasions by the executive branch of our government that our law cannot operate to relieve such persons from their allegiance to the countries in which they are born so long as they remain in such countries. It has also been generally held that where a naturalized American citizen returns to his native country, he may be held bound by such obligations, as, for example, the rendition of military service, as may have been due by him at the time of his departure from his native country.<sup>6</sup>

### Expatriation

Until comparatively recent times, except in the United States, the right of a citizen to cast off his natural allegiance, the allegiance into which he is born, was generally denied by the States of the world. This denial was made, but not always enforced in practice, in England down to the time of her Naturalization Act of 1870.

Since the first years of the Constitution the legislation of Congress upon the subject of naturalization has implied the right of expatriation. By the act of 1868 which is still in force, the right of expatriation was explicitly declared in the most unqualified manner.<sup>7</sup>

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<sup>6</sup> Cf. W. S. Tingle, *Germany's Claims Upon German-Americans in Germany*, Philadelphia, 1903.

<sup>7</sup> Rev. Stat., §§ 1999, 2000.

The enforcement, or rather the attempted enforcement, of this legislative declaration has led the diplomatic branch of our government into many difficulties. With reference to a considerable number of countries these difficulties have in a great measure been obviated by the negotiation with them of naturalization treaties.

Judicial decisions in the United States as to the existence of a right of expatriation in the absence of statutes creating it have not been uniform.<sup>8</sup>

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<sup>8</sup> Talbot *v.* Janson, 3 Dall. 133; 1 L. ed. 540; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; 7 L. ed. 617; M'Ilvaine *v.* Coxe, 2 Cr. 280; 2 L. ed. 279. See also Moore's *Digest of International Law*, III, § 433.

## CHAPTER XIV

### THE LEGAL STATUS OF INDIANS

#### **Indian lands**

The legal relations of the Indians to the various governments established by their white conquerors have had reference, broadly speaking: (1) to their rights to the lands occupied by them; and (2) to their political status either as tribes or individuals.

With reference to the title possessed by Indians in the lands occupied or hunted over by them, the principle was from the first applied by the white settlers that by discovery and occupation the title in fee to all the lands thus taken possession of became vested in the sovereign of the State under whose authority the conquest was made.

The principle that the original title to all the land within a State is in the sovereign of that State, and that by grant from him all individual titles are obtained, was the feudal one which the crown lawyers of England had developed; and, after the separation from that country, the American commonwealths continued to apply the doctrine, substituting, however, of course, the respective States for the English Crown. With the formation of the present Union, and the transfer to it by the several States of their respective claims to public lands, the United States was substituted as the owner of all the lands to which private titles had not been obtained. This grant to the Federal Government carried with it whatever interest or title the several States had had in the Indian lands.

The first discussion in the Supreme Court of the United

States of the title or interest still retained by the Indians in the lands occupied by them, was in the case of *Fletcher v. Peck*.<sup>1</sup> This case involved the question whether the State of Georgia had been seized in fee of certain lands which it had sold, but later resumed possession of. Marshall in his opinion, without attempting an argument, said: "The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State."

In *Johnson v. M'Intosh*<sup>2</sup> the question of titles to Indian lands was thoroughly examined and a conclusion reached which was substantially the same as that boldly stated without argument by Marshall in *Fletcher v. Peck*. In substance it was held that although the fee to Indian lands is in the United States, and, therefore, that the Indians are not able to grant titles to the same which will be recognized in the courts of the United States, nevertheless these Indians have certain possessory rights from which they may be dispossessed by the United States only with their consent, and upon compensation made.

The doctrines thus laid down in 1823 by Marshall in *Johnson v. M'Intosh* have never been changed, and the practice of the United States Government uniformly throughout its history has been in accordance with it. That is to say, where Indians have been dispossessed of their lands their consent, in form at least, has been obtained, and compensation made either in the form of money or other lands. Where tribal relations have been maintained these possessory rights have been held to be vested in the tribes respectively, and not severally in the

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<sup>1</sup> 6 Cr. 87; 3 L. ed. 162.

<sup>2</sup> 8 Wh. 543; 5 L. ed. 681.

individual Indians. From time to time, however, as we shall see, the United States Government has provided for the dividing up of these tribal lands and their apportionment in severalty among the individual Indians.

### **The legal status of Indians**

From the earliest times the Indians, though treated as subject to the sovereignty first of the foreign colonizing powers, then of the colonies or States, and, finally, of the United States, have been considered not as citizens or subjects, that is, as members of the various bodies politic within whose midst they have lived, but, from the constitutional point of view, as aliens, and their tribes as foreign nations to be dealt with as such, namely, by treaties and agreements rather than by statutes. As alien nations, their members have not, in default of express provision to the contrary, been held subject to the general laws of the States in which they have resided or to the statutes of the General Government. The relations of Indians to one another have been held to be a matter for the several tribal authorities to regulate, and when these tribal authorities have been impotent, the Indians have lived practically without law.

At the same time, however, that these Indians have thus enjoyed tribal autonomy, and their relations to the States and to the Federal Government regulated by treaties and agreements rather than by statute, and their tribes spoken of as foreign nations, there has never been any question that, in reality, the sovereignty over them after the Revolution and prior to 1789 was in the individual States, and since that time in the United States. From the point of view of general international relations the Indians have always been subjects of the American States or the United States, and, consequently, foreign States have never been conceded to have a right to deal

directly with them. Furthermore, from the point of view of American constitutional law, such attributes of independence and sovereignty as they have enjoyed have been derived from the States, or, since 1789, from the Federal Government. Hence these rights have been at all times subject to withdrawal without the Indians' consent. This was conspicuously shown by the act of Congress of 1871. This law for the enactment of which the consent of the Indians was neither sought nor obtained declared: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."<sup>3</sup>

Since this act of 1871 the legal supremacy of the United States has been further shown by a number of legislative acts, some of them extending the authority of Federal laws and the jurisdiction of the Federal courts over acts previously subject exclusively to the authority of the tribes; others providing for the apportionment in severalty of the tribal lands and the naturalization of Indians without their request or consent.

The only direct references to the Indians in the Constitution are the provisions that "Indians not taxed" shall not be counted in determining the number of representatives in Congress to which a State is to be entitled,<sup>4</sup> and that Congress shall have power "to regulate commerce . . . with the Indian tribes."<sup>5</sup> It has, however, been held by the Supreme Court that the General Government has an authority over the Indians not springing from specific grants of power, aside from the general treaty-making power, but from the practical necessity of

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<sup>3</sup> Rev. Stat., § 2079.

<sup>4</sup> Art. I, § 3.

<sup>5</sup> Art. I, § 8, cl. 3.

protecting the Indians and the non-existence of a power to do so in the States.<sup>6</sup>

**Federal jurisdiction exclusive. Cherokee Nation v. Georgia**

The exclusiveness of this Federal jurisdiction, and, consequently, the lack of constitutional power of the States in this field, first came up for serious discussion in the Supreme Court of the United States in the case of the *Cherokee Nation v. Georgia*,<sup>7</sup> decided in 1831. This case came before the court on a motion on behalf of the Cherokee Nation of Indians for a subpœna and for an injunction to restrain the authorities of the State of Georgia from executing the laws of the State within the Cherokee territory as designated by a treaty between the United States and the Cherokee Nation. The case, however, was not decided on its merits, the majority of the court, including Chief Justice Marshall, holding that the Cherokee Nation was not a foreign State within the meaning of the clause of the Constitution which extends the Federal judicial power over controversies "between a State or the citizens thereof, and foreign States, citizens, or subjects," and gives to the Supreme Court original jurisdiction in cases in which a State is a party. It was held, therefore, that the court was without power to entertain the suit.

Upon this point, Marshall, in his opinion, said: "Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right, to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may be well doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy,

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<sup>6</sup> *United States v. Kagama*, 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228.

<sup>7</sup> 5 Pet. 1; 8 L. ed. 25.

be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their father. They and their country are considered by foreign countries, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility."

In the great case of *Worcester v. Georgia*,<sup>8</sup> decided in 1832, the question of the political status of the Indians again came before the Supreme Court for discussion and a doctrine laid down which has remained unquestioned to the present day. This case, like *Cherokee Nation v. Georgia*, grew out of the attempt of Georgia to exercise jurisdiction over Indian territories situated within the State's limits. This action of the State was declared unconstitutional and void, the exclusive authority of the Federal Government being emphatically asserted, "the Cherokee Nation" the court say, "is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . . The whole intercourse between this nation is by our Constitution and laws, vested in the Government of the United States."

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<sup>8</sup> 6 Pet. 515; 8 L. ed. 483. See also *The Kansas Indians*, 5 Wall. 737; 18 L. ed. 667; *The New York Indians*, 5 Wall. 761; 18 L. ed. 708.



**Naturalization of Indians by statute**

In 1884, in the case of *Elk v. Wilkins*,<sup>9</sup> the question arose as to whether an Indian, born a member of one of the Indian tribes within the United States, became a citizen of the United States, under the Fourteenth Amendment, by reason of his birth within the United States, and his afterwards voluntarily separating himself from his tribe and taking up residence among white citizens. The court held negatively, the statement being made that "the alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without action or assent of the United States."

Since this decision a number of acts of Congress have been passed which have had the effect of destroying, to a very considerable extent, the autonomous tribal governments of the Indians and of subjecting them to the immediate legislative control of Congress instead of to the treaty-making power.<sup>10</sup>

At various times during past years, Congress has declared, as to particular Indian tribes, that their lands should be divided and held in severalty by their respective members, and that, thereupon, such Indians should become citizens of the United States, and pass immediately from the exclusive jurisdiction of the Federal Government to that of the States in which they reside. By the General Land in Severalty Law, known as the "Dawes Act," approved February 8, 1887, the President was given the power to apply this process to practically every Indian reservation in the country. The peculiarity of these acts is, it will be observed, that they make citizens of Indians

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<sup>9</sup> 112 U. S. 94; 5 Sup. Ct. Rep. 41; 28 L. ed. 643.

<sup>10</sup> As to the constitutionality of this legislation, and its effect upon the jurisdiction of the States, see *United States v. Kagama*, 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228.

against their will. The action is taken at the discretion of the President and the result is citizenship.<sup>11</sup>

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<sup>11</sup> For cases sustaining this legislation, and declaring generally the extent of the legislative authority of Congress over the Indians, see *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641; 10 Sup. Ct. Rep. 965; 34 L. ed. 295; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. Rep. 722; 43 L. ed. 1041; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; 23 Sup. Ct. Rep. 115; 47 L. ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 553; 23 Sup. Ct. Rep. 216; 47 L. ed. 299; *United States v. Rickert*, 188 U. S. 432; 23 Sup. Ct. Rep. 478; 47 L. ed. 532; *In re Hoff*, 197 U. S. 488; 25 Sup. Ct. Rep. 506; 49 L. ed. 848; *Tiger v. Western Investment Co.*, 31 Sup. Ct. Rep. 378; *Hallowell v. United States*, 31 Sup. Ct. Rep. 587.

## CHAPTER XV

### THE ADMISSION OF NEW STATES

#### **The admission of new States**

The process of admitting new States to the American Union is a comparatively simple one and but few constitutional questions have arisen in connection with it. The constitutional clause governing the subject reads as follows: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; or any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress."<sup>1</sup> It will thus be seen that nothing is said as to the conditions that must be met by a given Territory before it may claim, or Congress be obligated to grant, admission to the Union as a State. The whole matter is left absolutely to the discretion of Congress. There can be no question that at the time of the adoption of the Constitution the idea was generally held that all non-State territory held or to be held by the United States was to be regarded as material from which new States were to be created as soon as population and material development should warrant. But no attempt was made to force the hand of Congress under circumstances that could not be

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<sup>1</sup> Art. IV, § 3.

foreseen by defining in the Constitution itself the conditions under which Statehood should be accorded. But one limitation is laid down, and that impliedly, and this relates rather to the status of new States after admission, than to the process of admission itself. This is that the new commonwealths, when received into constitutional fellowship with the older members of the Union, shall stand upon an exactly equal footing with them.

As has been seen, the Constitution does not attempt to fix the *modus operandi* in which new members are to be admitted into the Union. It does not even say whether they are to be formed from territory already under its sovereignty, and in one instance, that of Texas, a new State was received by the direct process of incorporating, by a joint resolution of Congress, a foreign independent State. In all other cases, however, new States have been formed from areas already belonging to the United States and organized as Territories.

There has been some little constitutional speculation as to whether the decisive, creative act in the bringing into existence of a new State is the Resolution of Congress approving the Constitution that has been drawn up and declaring the former Territory one of the States of the Union; or whether the vivifying force is derived from the constituent act of the people of the Territory in framing and adopting their State Constitution. The latter is the view most acceptable to the States' Rights School. It would seem to be sufficiently plain, however, that the former is the correct doctrine; for there can be no question that it lies within the power of Congress arbitrarily to refuse its approval to a Constitution that has been framed by the people of a Territory strictly in accordance with the requirements of the Enabling Act. The final and, therefore, decisive step, has thus to be taken by the Federal Government.

This doctrine has, indeed, received implied judicial sanction at the hands of the United States Supreme Court in the case of *Scott v. Jones*.<sup>2</sup>

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<sup>2</sup> 5 How. 343; 12 L. ed. 181. Cf. Jameson, *Constitutional Convention*, § 207.

## CHAPTER XVI

### THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY

#### Sources of power

In the chapters that have gone before the effort has been made to set forth the constitutional relations existing between the Union and its commonwealth members. From the very beginning, however, the American constitutional system has included other political units than the States. These units are Territories, Dependencies, and a Federal District or Seat of National Government. To a consideration of the constitutional questions incident to the annexation and government by the National Government of the territories and peoples of which these political elements are composed, we shall now turn. This will involve a discussion of the following points: (1) The constitutional power of the United States to acquire territories; (2) the modes or purposes for which they may be acquired; and (3) their constitutional status. First then as to the power to acquire.

The constitutional power of the United States to annex foreign territory has been, at various times, and by various writers, derived from the following sources:

1. The power to admit new States into the Union.
2. The power to declare and carry on war.
3. The power to make treaties.
4. The power, as a sovereign State, to acquire territory by discovery and occupation or by any other methods recognized as proper by international usage.

With regard to deriving the power to annex from the

power to admit new States, it is sufficient to observe that not only is resort to this source unnecessary, but, when appealed to, it would not seem to yield to the National Government as ample powers as are furnished it when the treaty and war powers are relied upon: and, furthermore, that considerable support is given to the position that, when the power is exercised, the consent of the other States should be obtained

There can be no question that it was the general intention at the time the Constitution was adopted that all the territory then under the sovereignty of the United States, and not included within the limits of any one of the then several States, should ultimately be divided up and admitted as States into the Union. Also it is to be admitted that, beyond all reasonable doubt, those who framed and adopted the Federal Constitution did not anticipate, and therefore cannot be said deliberately to have provided for, the time when the United States should extend its sovereignty over territories not intended ultimately for Statehood. Nor can it be said that a different view was held upon this point by practically anyone until comparatively recent times. But, admitting this, the conclusion that the annexation of territory not intended for ultimate Statehood is an unconstitutional act does not follow. One must go further and show that had the particular case been suggested to those framers and adopters of the Constitution, they would have so modified its language as to have excluded it.<sup>1</sup> In the second place, even were this principle of constitutional construction not sufficiently

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<sup>1</sup> In *Dartmouth College v. Woodward*, 4 Wh. 518; 4 L. ed. 629, Marshall says: "The case being within the words of the rule, must be within its operation likewise, unless there be something within its literal construction so obviously absurd or mischievous, or repugnant to the general spirit of that instrument as to justify those who expound the Constitution in making it an exception."

broad to uphold the Federal power in question, there would be applicable two principles, each of which would prevent the Supreme Court from passing upon this point. The first of these principles is the one elsewhere mentioned that the question of *de facto* and *de jure* sovereignty is one regarding which the courts hold themselves bound by the determination of the executive and legislative branches of the government; the second is that the motive of an act, except for the purpose of solving an ambiguity in its application, is not a proper subject for judicial examination, and that, therefore, in the case of annexation of territory, it would not be proper for the court to require whether or not ultimate Statehood is intended to be granted the lands and peoples obtained. Indeed, as we have seen, as regards the contiguous continental territories of the United States, it has been uniformly held that the grant to them of Statehood lies wholly within the discretion of Congress, and that no legal means exist for compelling action should that body arbitrarily refuse for an indefinite length of time to grant this privilege to a deserving territory.

The question whether or not territory not contiguous to the other territory of the United States may be annexed is one very similar to the one just discussed and may be answered in much the same manner.<sup>2</sup>

### **The right to annex based on the treaty and war powers**

The Supreme Court has held that whether or not the right to admit States into the Union carries with it the power to acquire new territory, this power is derivable from the authority of the General Government to declare and carry on war and to enter into treaties. This has been

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<sup>2</sup> See Senate Rept. 681; 55th Cong., 2d Sess., pp. 47, 48.



repeatedly declared, both in earlier cases and in the more recent so-called Insular Cases.

In *American Insurance Co. v. Canter*,<sup>3</sup> Marshall says, without, apparently, deeming an argument necessary: "The Constitution confers absolutely upon the government of the Union the power of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or treaty." In *Fleming v. Page*,<sup>4</sup> Taney says: "The United States may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered or to reimburse the government for the expenses of the war." In *Stewart v. Kahn*,<sup>5</sup> the court say: "The war power and the treaty-making power each carries with it authority to acquire new territory." And in *United States v. Huckabee*<sup>6</sup> it is declared: "Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States."

It is to be observed that in none of these cases is there any argument to show just why, and in what manner, the acquiring of the foreign territory is a necessary or proper means by which war may be carried on, or treaties entered into. In fact it will be seen that the acquiring of foreign territory has been treated as a result incidental to, rather than as a means for, the carrying on of war and the conducting of foreign relations.

This leads to the consideration of the doctrine which, constitutionally speaking, appeals to the author as the soundest mode of sustaining the power of the United

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<sup>3</sup> 1 Pet. 511; 7 L. ed. 242.

<sup>4</sup> 9 How. 603; 13 L. ed. 276.

<sup>5</sup> 11 Wall. 493; 20 L. ed. 176.

<sup>6</sup> 16 Wall. 414; 21 L. ed. 457.

States to acquire territory, as well as the one which, in application, affords the freest scope for its exercise. According to this principle the right to acquire territory is to be searched for, not as implied in the power to admit new States into the Union, or as dependent specifically upon the war and treaty powers, but as derived from the fact that in all relations governed by the principles of international law the General Government may properly be construed to have, in the absence of express prohibitions, all the powers possessed generally by the sovereign States of the world. This doctrine thus is that the control of foreign relations being exclusively vested in the United States, that government has in the exercise of this jurisdiction the same power to annex foreign territory that is possessed by other sovereign States. The argument in support of this doctrine has already been given.

In one instance at least the United States has acquired territory under an authority which could not be, and was not alleged to be, derived from the treaty-making power or from any other specific express power, but was upheld by the Supreme Court as based upon the general sovereignty of the nation with respect to all matters that fall within the field governed by international law. Reference is here had to the annexation in 1856 of the Guano Islands by a statute of Congress which declared that whenever any citizen of the United States should discover a deposit of guano on any island, rock or key not within the lawful jurisdiction of any other government, and should take possession thereof, such island, rock or key might, at the discretion of the President, be considered as appertaining to the United States.<sup>7</sup>

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<sup>7</sup> See *Jones v. United States*, 137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691.

## **The modes in which territory may be acquired by the United States**

Having discussed the constitutional power of the United States to acquire territory whether by treaty, conquest or discovery and occupation, we now approach the question as to the modes by which this Federal authority may be exercised.

A history of the territorial expansion of the United States shows that territories have been annexed in three different ways: (1) by statute; (2) by treaty, and (3) by joint resolution of the two houses of Congress.

The process of expanding American sovereignty by simple statute and executive action authorized thereby, was illustrated, as we have just seen, in the case of the Guano Islands. The annexation of territory by treaty has been the method most usually employed. The Louisiana Territory, Florida, Alaska, the Mexican cessions, the Samoan Islands, Porto Rico, and the Philippines were obtained in this manner. The constitutionality of this mode of acquisition has already been discussed.

### **Annexation by joint resolution**

In two instances, that of Texas, in 1845, and Hawaii in 1898, the sovereignty of the United States has been extended over new territory by means of a joint resolution of the two Houses of Congress. In the case of Texas an attempt had been made to annex the territory by treaty, but this effort, requiring a two-thirds favorable vote in the Senate, had failed. Thereupon the same end was secured by a joint resolution which needed but a simple majority vote in each of the two branches of the national legislature, with, of course, the approval of the President.

The peculiarity of the annexation of this State was not simply that it came under American sovereignty by joint resolution but that it became at once one of the States of

the Union, and thus never had the transitional territorial status. This fact, indeed, gave additional constitutional support to the action of Congress in the matter, for to that body is given by the Constitution the power to admit new States into the Union, and, therefore, its admission of Texas to fellowship with other American commonwealths might easily be construed as a legitimate exercise of that power.

The acquisition of the Hawaiian Islands was another instance of the extension of the United States sovereignty by a simple joint resolution of the two branches of Congress. In this case, however, the islands were not, as was Texas, admitted as a State or States of the Union, but were simply annexed as a territory.

The constitutionality of this mode of annexation has never been disputed in the courts, because, as has been earlier pointed out, questions as to the territorial extent of the sovereignty of the United States are political in character and, therefore, the decisions of the legislative and executive branches of government as to them are not judicially reviewable.

## CHAPTER XVII

### THE CONSTITUTIONAL SOURCES OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES

#### **Power to govern Territories not questioned**

There has never been any question as to the power of the United States to govern the Territories possessed or acquired by it and not included within the limits of any of the individual States. The only question has been as to the source and extent of this power. The Federal authority to govern has been derived from three sources: (1) The express power given to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" (2) the implied power to govern derived from the right to acquire territory; and (3) the power implied from the fact that the States admittedly not having the power, and the power having to exist somewhere, it must rest in the Federal Government.

All three of these sources of authority have been, at different times, recognized by the Supreme Court.<sup>1</sup>

#### **Power to govern absolute**

Since the time when the necessity for the exercise of the power arose, there has been almost no question as to the

<sup>1</sup> *Sere v. Pitot*, 6 Cr. 332; 3 L. ed. 240; *American Insurance Co. v. Canter*, 1 Pet. 511, 7 L. ed. 242; *Cross v. Harrison*, 16 How. 164; 14 L. ed. 889; *Scott v. Sandford*, 19 How. 393; 15 L. ed. 691; *United States v. Kagama*, 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228; *Mormon Church v. United States*, 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478; *DeLima v. Bidwell*, 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

absolute power of Congress to determine the form of political and administrative control to be erected over the Territories, and to fix the extent to which their inhabitants shall be admitted to a participation in their own government. Both by legislative practice and by judicial sanction, the principle has, from the first been asserted that upon this matter the judgment of Congress is absolute. This, however, has not been construed to carry with it the absolute control of the Federal legislature over the civil rights—the private rights of person and property of the inhabitants of the Territories. The extent of the power of Congress with respect to these will be discussed in the next chapter.

The plenary character of the legislative power of Congress with respect to the government of Territories is perhaps best stated in *National Bank v. County of Yankton*.<sup>2</sup> Chief Justice Waite, speaking for the court, says: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

### **Territorial governments are congressional governments**

The governments established in the Territories by Congress act as agencies of Congress, in the same sense that an administrative board acts as the agent of the lawmaking body that creates it. As such congressional agencies,

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<sup>2</sup> 101 U. S. 129; 25 L. ed. 1046. See also, for similar comprehensive statements, *Murphy v. Ramsey*, 114 U. S. 15; 5 Sup. Ct. Rep. 747; 29 L. ed. 47; and *Mormon Church v. United States*, 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478.

the territorial governments are, therefore, not considered as parts of the General Government established or directly provided for by the Constitution. Thus, speaking with reference to the courts established in the Territories, Marshall in an early case declared: "These . . . are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." <sup>3</sup>

And again in *Benner v. Porter* <sup>4</sup> the court say, with reference to territorial governments: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers on the organization and government of the territories, combining the power of both the Federal and State authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine."

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<sup>3</sup> *American Insurance Co. v. Canter*, 1 Pet. 511; 7 L. ed. 242.

<sup>4</sup> 9 How. 235; 13 L. ed. 119. See also *In re Cooper*, 143 U. S. 472; 12 Sup. Ct. Rep. 453; 36 L. ed. 232; and *United States v. Coe*, 155 U. S. 76; 15 Sup. Ct. Rep. 16; 39 L. ed. 76, to the effect that admiralty jurisdiction may be exercised by these courts, and also that the Supreme Court may entertain appeals from them.

## CHAPTER XVIII

### THE DISTRICT OF COLUMBIA

#### **The government of the District of Columbia**

The constitutional status of the district used as the seat of the Federal Government is almost the same as that of the Territories. Clause 17 of § 8 of Article I of the Constitution empowers Congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States."

The District of Columbia though not a "State" in the sense in which that word is used in the constitutional clause, which gives to the Federal courts jurisdiction in suits between citizens of different States, it is declared in *DeGeofroy v. Riggs*,<sup>1</sup> to be a State within the meaning of a treaty granting certain rights to aliens within the "States of the Union." That the District is a part of the United States internationally viewed was declared in *Loughborough v. Blake*, and this *dictum* has never been questioned.

But with reference to the form of government to be given the District, the authority of Congress is as absolute as we

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<sup>1</sup> 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642. See also *Loughborough v. Blake*, 5 Wh. 317; 5 L. ed. 98, and *Hepburn v. Ellzey*, 2 Cr. 445; 2 L. ed. 332, in the last of which cases it was held that the district is not a State of the Union within the meaning of that provision of the judicial article of the Constitution which gives to the Federal courts jurisdiction in suits between citizens of different States.



have seen it to be with regard to the Territories. "The Congress of the United States being empowered by the Constitution 'to exercise exclusive jurisdiction in all cases whatever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State may exercise within a State."<sup>2</sup>

The Constitution provides that Congress shall "exercise exclusive legislation in all cases whatsoever" over such district as shall, by cession of particular States, become the seat of Government. To the author it would seem that the intent of those who framed this provision was that by it Congress should be granted authority exclusive of the State or States by which the territory constituting the District might be ceded. Congress has, however, since the beginning, acted upon the assumption that by this provision it is intended that while ordinary municipal powers may be delegated to the local governing body in the District, it may not delegate to such body the general legislative powers possessed by a State of the Union; that, in other words, the legislative authority over the District being vested by the Constitution "exclusively" in Congress, it may not by delegation be exercised by any other body. Thus, dividing the governing powers in the United States into national, State and local, it has been held necessary that, as regards the District, the first two must be exercised by Congress itself.<sup>3</sup>

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<sup>2</sup> Capital Traction Co. v. Hof, 174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873.

<sup>3</sup> It cannot be said that the Supreme Court has passed squarely upon this point, but by various *dicta* the doctrine stated in the text has been declared. See, *e. g.*, Stoutenburgh v. Hennick, 129 U. S. 141; 9 Sup. Ct. Rep. 256; 32 L. ed. 637; Cohens v. Virginia, 6 Wh. 264; 5 L. ed. 257. Also Roach v. Riswick, McArthur & Mackay, 171.

When legislating for the District, and the same is true of the Territories, Congress acts not only as a local legislature in the sense that a State legislature acts as the local legislature for that State, but also as a National Legislature. Whence it follows that the laws thus enacted, though of course only applicable to the local areas, the District, or the Territories, especially referred to, are yet national acts in that, so far as it is necessary for their enforcement, they have a validity throughout the Union. This doctrine is clearly laid down by Marshall in *Cohens v. Virginia*,<sup>4</sup> and has not since been questioned.

### Places purchased

The same clause of the Constitution which grants to Congress exclusive jurisdiction over the district to be selected for the seat of the National Government, authorizes Congress "to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The Federal ownership of such tracts within the States is to be sharply distinguished from political jurisdiction over them. This latter, as the Constitution provides, may be obtained only when the districts have been acquired with the consent of the States in which they are situated.

The language of the clause would seem to indicate that the framers of the Constitution intended that the General Government could or should acquire land within the States only by purchase, and with the consent of the States. In practice, however, this consent has not always been obtained, or been deemed necessary. But, in such cases,

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<sup>4</sup> 6 Wh. 264; 5 L. ed. 257.

the political jurisdiction of the State is not ousted, unless the lands are used for the purposes of government.<sup>5</sup>

Also, the General Government is able to acquire lands within the States by the exercise of the right of eminent domain, a right which it may employ when "necessary and proper" to the exercise of any of its expressly given powers. When thus obtained, the lands, like those acquired by direct purchase and without the consent of the States, remain subject to the general political jurisdiction of the States in which they are located. As property of the United States they are not, however, subject to taxation by the States.<sup>6</sup>

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<sup>5</sup> *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525; 5 Sup. Ct. Rep. 995; 29 L. ed. 264.

<sup>6</sup> *Kohl v. United States*, 91 U. S. 367; 23 L. ed. 449; *St. Louis v. W. U. Telegraph Co.*, 148 U. S. 92; 13 Sup. Ct. Rep. 485; 37 L. ed. 380; *Van Brocklin v. Tennessee*, 117 U. S. 151; 6 Sup. Ct. Rep. 670; 29 L. ed. 845.

## CHAPTER XIX

### MILITARY AND PRESIDENTIAL GOVERNMENT OF ACQUIRED TERRITORY

#### Conquest or military occupation does not operate to annex territory

Mere conquest, that is, the occupation by military force of foreign territory, is not sufficient to annex such territory to the State whose forces are in possession of it. However, for the time being, as a belligerent right, and from necessity, the entire control of this area, its government, and the lives and property of its inhabitants are in the hands of the victorious power. The inhabitants are no longer protected by the State whose forces have been ousted, and for the time being owe no allegiance to it, but owe an allegiance to the State which is in possession.<sup>1</sup>

The government established and maintained by one State in military possession of territory of another, is, of course, a *de facto* one, but *de facto* in a somewhat different sense from an insurrectionary government established as a result of a rebellion or civil war. But in either case the authority of the *de facto* government is, to an extent at least, recognized by the *de jure* government. This is adverted to by the Supreme Court in *Thorington v.*

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<sup>1</sup> *United States v. Rice*, 4 Wh. 246; 4 L. ed. 562; *Fleming v. Page*, 9 How. 603; 13 L. ed. 276; *Neely v. Henkel*, 180 U. S. 109; 21 Sup. Ct. Rep. 302; 45 L. ed. 448; *DeLima v. Bidwell*, 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041; *Dooley v. United States*, 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

Smith<sup>2</sup> in passing upon the status of the Confederate Government established during the Civil War.

In *New Orleans v. New York Mail Steamship Co.*<sup>3</sup> was considered the status of territory of the Southern Confederacy which had been conquered by the Federal forces. The court held that the Federal forces in possession might exercise the same absolute authority as in the case of territory conquered from a foreign State.

### **Presidential government**

The government maintained by the President over a conquered territory, being belligerent, is, according to the general doctrines of international law regarding military occupation, absolute in character: "It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war."<sup>4</sup>

It has been seen from the preceding cases that the power of the President, as Commander-in-Chief of the army and navy, is practically absolute over conquered territory. And also, as was held in *Cross v. Harrison*, that this power persists after the formal annexation of the territory in question to the United States and until Congress legislates for its government. It would appear, however, that during this latter period, the President's power is not as absolute as in the period prior to annexation. Absolute power, according to American constitutional doctrines, is only justified by military necessity, and, therefore, with the cessation of hostilities and the annexation of the territory by which it is brought within the general province of the American doctrine, there spring up certain limita-

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<sup>2</sup> 8 Wall. 1; 19 L. ed. 361.

<sup>3</sup> 20 Wall. 387; 22 L. ed. 354.

<sup>4</sup> *N. Orleans v. N. Y. Mail S. S. Co.*, 20 Wall. 387; 22 L. ed. 354

tions upon the President's governing power.<sup>5</sup> The extent of these limitations will be discussed in a later chapter dealing with martial and military law, and with the doctrines laid down by the Supreme Court in the "Insular Cases" determining the political status and the civil rights of the inhabitants of the islands acquired in 1898 from Spain.

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<sup>5</sup> *Dooley v. United States*, 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

## CHAPTER XX

### ANNEXATION OF TERRITORY BY TREATY

#### Status of territory annexed by treaty

That, under the treaty-making power provided in the Constitution, a foreign country may be brought under the sovereignty of the United States, and thus, from the point of view of international law, become a part of it, is, as we have seen, beyond question. In *De Lima v. Bidwell*,<sup>1</sup> one of the "Insular Cases," decided in 1901, the point was urged, however, that, before such annexed territory can become "domestic" territory and as such be brought, *ipso facto*, under the operation of the Federal laws generally, an act of Congress to that effect is necessary.

Prior to the *De Lima* case, this question had been several times raised, especially with reference to the immediate applicability of the revenue laws of the United States to annexed territories, but had never been thoroughly discussed, nor had administrative practice and the laws been harmonious with judicial pronouncements, nor these judicial pronouncements harmonious with one another.

In *Fleming v. Page*,<sup>2</sup> decided in 1850, it was held, as has been seen, that conquest and military occupation of a foreign district do not, *ipso facto*, make that district a part of the United States, and, therefore, that duties may properly be levied upon goods imported therefrom into the United States under an act of Congress imposing duties

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<sup>1</sup> 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

<sup>2</sup> 9 How. 603; 13 L. ed. 276.

upon imports from foreign countries. Taney, however, in his opinion went further than the facts of the case necessitated, and adverted to the circumstance that the administrative department of the government had, as a rule, continued to treat territory acquired by treaty as foreign until Congress by legislation had extended over it its revenue laws.

In *Cross v. Harrison*,<sup>3</sup> however, decided in 1853, it was held by a unanimous court, including Chief Justice Taney himself, that by the ratification of the treaty of 1848 between Mexico and the United States, California became a part of the United States, and the tariff laws of the United States then in force *ipso facto* applicable to it.

In *De Lima v. Bidwell*,<sup>4</sup> with reference to the Island of Porto Rico, the court held itself governed by the doctrine declared in *Cross v. Harrison*,

Applying the doctrine of *De Lima v. Bidwell*, the Supreme Court, in another of the Insular Cases, *Dooley v. United States*,<sup>5</sup> held that though, after the treaty of peace providing for the annexation of Porto Rico, the military government might continue until Congress should provide the island with a civil government (according to the doctrine of *Cross v. Harrison*), the island was no longer "foreign territory," and, therefore, under the then existing revenue laws of the United States, providing for the levying of customs duties on goods imported from foreign countries, that duties might not be levied on importations into the United States from Porto Rico, nor from the United States into that island.

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<sup>3</sup> 16 How. 164; 14 L. ed. 889.

<sup>4</sup> 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

<sup>5</sup> 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074. See also *Jecker v. Montgomery*, 13 How. 498; 14 L. ed. 240; *Raymond v. Thomas*, 91 U. S. 712; 23 L. ed. 434.



In the case of *The Diamond Rings*,<sup>6</sup> decided in 1901, the court applied the doctrine of *De Lima v. Bidwell* in fixing the status of the Philippine Islands subsequent to the treaty of cession. The fact that resistance on the part of the natives to the control of the United States continued to be made, was held to be without weight.

### **Presidential powers**

The absolute power of Congress to determine the political or governmental rights in annexed territories constitutionally attaches from the moment that they become subject to the sovereignty of the United States. Until Congress exercises this right, however, and provides them with governments and laws, they remain under the control of the Federal executive. This duty devolves upon the President as a result of his general obligation to see that the authority and peace of the United States are everywhere maintained throughout its territorial limits. Thus, after the treaty of peace with Spain in 1899, Porto Rico remained under the control of the President until by the act of April 12, 1900, known as the "Foraker Act," Congress provided a government for that island. So also it was by an exercise of the same authority that the President, after the same treaty of cession, appointed commissions for the government of the Philippine Islands.

On March 2, 1901, Congress enacted that "All military, civil and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government and for the maintaining and protecting of the inhabitants of said islands in the free enjoyment of their liberty, property and

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<sup>6</sup> 183 U. S. 176; 22 Sup. Ct. Rep. 59; 46 L. ed. 138.

religion." This act changed the basis of the Philippine government from a presidential to a congressional one, but did not change its form, the President being given by Congress practically the same powers that before that time he had exercised by virtue of his position as Chief Executive.

By the act of July 1, 1902, entitled "an act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," Congress not only approved and ratified the previous acts of the Philippine Commission, but went on to define the general line of action which that body should take, especially with regard to the introduction of local self-government as fast as circumstances should warrant.

The constitutional source of the power of the United States to establish and maintain governments not annexed to itself but in the possession of its military forces is derived both from the power given Congress to declare and wage war, and from the fact of its exclusive authority in all that relates to international affairs, which fact, as we have seen, properly implies the right, in the absence of express prohibitions, to exercise all the powers possessed by sovereign States generally.

From the same source was derived the power of the United States to administer Cuba, and to establish consular courts in oriental countries.

## CHAPTER XXI

### THE DISTINCTION BETWEEN INCORPORATED AND UNINCORPORATED TERRITORIES

#### Limitations upon Congress

The Constitution of the United States contains a number of express limitations upon the Federal legislative power. In addition to those contained in the first ten Amendments relative to freedom of religion, speech, and press, the quartering of troops, the right of the people to assemble, to petition, to keep and bear arms, to be secure against unreasonable searches and seizures, to presentment or indictment by jury, to speedy trials, to juries in civil suits, to immunity from excessive bails and fines and cruel and unusual punishments, etc., it is elsewhere provided in the Constitution that all duties, imposts, and excises shall be uniform throughout the United States, that the writ of habeas corpus shall not be suspended, except under certain specified circumstances, that no bill of attainder or *ex post facto* law shall be passed, no capitation or other direct tax laid except in proportion to population, no duty laid upon goods exported from a State, no commercial preferences given to the ports of one State over those of another, no money drawn from the treasury but in consequence of an appropriation made by law, no title of nobility granted, etc. The Thirteenth Amendment also declares that "neither slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

When legislating for the States or for their inhabitants these limitations have of course to be observed. The question whether the same is true when Congress is legislating for the Territories and their populations has now to be examined.

In the preceding chapters we have learned the source whence is derived the power of Congress and of the President to govern annexed territories. We have learned that by mere military occupation a territory, though for the time being subject to the *de facto* control of the President as Commander-in-Chief of the army and navy, is not annexed to the United States, that is, it does not become permanently subject *de jure* as well as *de facto* to its sovereignty. Only by treaty, or by statute, or by joint resolution of Congress, may this annexation be effected.

When thus annexed, however, a district may, according to the recent "Insular Cases," find itself, or by subsequent legislative action be placed, in any one of the following categories:

1. A State of the Union.
2. A "Territory" incorporated into the Union. This Territory may be either "unorganized" or "organized."
3. A Territory appurtenant to, that is, subject to the sovereignty of the United States, but not "incorporated," constitutionally speaking, into the Union of States and Territories for the benefit and protection of whose inhabitants the Constitution was adopted.

Such "appurtenant," dependent or unincorporated territory is, of course, from the international point of view a part of the United States, but is not, as we shall see, a part thereof in the stricter constitutional sense in which the term is used in the Constitution with reference to certain limitations which that instrument lays upon the legislative powers of Congress.

### **Distinction between incorporated and unincorporated Territories**

With respect to the form of government that may be established and maintained by Congress over the Territories, there is no distinction between an incorporated and an unincorporated Territory. In either case the congressional authority is absolute as to whether local self-governing powers will be granted to their inhabitants. With respect, however, to the civil or private rights of the inhabitants of the Territories, the distinction is very important. For if it be that a Territory is merely appurtenant to, but not "incorporated" into the United States, Congress in its legislation regarding it is bound by but few of the limitations which apply in the case of incorporated Territories, whether organized or unorganized.

This distinction between incorporated and unincorporated territory is one that was not clearly made until the decision of the Insular Cases in 1901. Furthermore indeed, it can hardly be said to have been known prior to that time, there had been a number of decisions by the Supreme Court which indicated that such a distinction did not, and could not, exist according to the constitutional law of the United States. There were, however, on the other hand, not a few legislative and administrative precedents which supported such a doctrine; and by rigorously confining the contrary decisions of the Supreme Court to the facts of the cases in which they were rendered, it was found possible to escape from their control, and to hold that the term "United States" as used in at least some of the clauses of the Constitution, does not, and was not intended to, include all districts subject to the sovereignty of the United States; and that as to such areas not within the limits of the "United States," in this strict constitutional sense, Congress, in the exercise of its legislative powers, is not subject to the limitations which rest

upon it when dealing with Territories which are included in the United States.<sup>1</sup>

### The Insular Cases

As a result of the Spanish-American War the United States came into possession of territories over which, because of their location, their economic and industrial status, and especially the character of their populations, it was deemed expedient to give to the Executive or to Congress the freest possible discretion with reference not only to the manner in which they should be governed, but to the civil rights that should be granted their inhabitants. The question whether, in dealing with these new insular possessions, Congress should be held subject to all those constitutional limitations which apply when dealing with civil rights in the States or in the then existing Territories, thus became a most important one.

The form in which this question arose for judicial determination was as to the constitutionality of that clause of the Foraker Act establishing civil "congressional" government in Porto Rico, which provided a scale of customs duties to be paid upon goods brought into the ports of the

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<sup>1</sup> Chief among the cases, prior to 1901, dealing with the status of Territories, and the civil rights of their inhabitants are the following: *Loughborough v. Blake*, 5 Wh. 317; 5 L. ed. 98; *American Insurance Co. v. Canter*, 1 Pet. 511; 7 L. ed. 242; *Webster v. Reid*; 11 How. 437; 13 L. ed. 761; *Scott v. Sandford*, 19 How. 393; 15 L. ed. 691; *Reynolds v. U. S.*, 98 U. S. 145; 25 L. ed. 244; *National Bank v. Yankton*, 101 U. S. 129; 25 L. ed. 1046; *Murphy v. Ramsey*, 114 U. S. 15; 5 Sup. Ct. Rep. 747; 29 L. ed. 47; *Callan v. Wilson*, 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223; *Mormon Church v. U. S.*, 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478; *American Publishing Co. v. Fisher*, 166 U. S. 464; 17 Sup. Ct. Rep. 618; 41 L. ed. 1079; *Springville v. Thomas*, 166 U. S. 707; 17 Sup. Ct. Rep. 717; 41 L. ed. 1172; *Thompson v. Utah*, 170 U. S. 343; 18 Sup. Ct. Rep. 620; 42 L. ed. 1061.

United States from the island. This necessarily involved an answer to the question whether the provision of the Constitution that "all duties, imposts and excises shall be uniform throughout the United States" applied *ex proprio vigore* to Porto Rico, or whether, having never been formally "incorporated" by Congress into the United States either expressly or by implication, the island was not a part of the "United States" within the meaning of the term as used in the constitutional clause just quoted.

In *Downes v. Bidwell*<sup>2</sup> five of the nine justices of the Supreme Court concurred in holding that, though by the treaty of cession the island of Porto Rico came under the sovereignty of the United States, and when viewed from the standpoint of all other nations became a part of the United States, it did not, when looked at from the point of view of its own public law, become a part of the "United States" as that term is used in the Constitution.

Four of these five justices were able to reach this conclusion: First, by making a sharp distinction between "incorporated" and "unincorporated" Territories; Second, by holding that the treaty-making power though able to annex Territories to the United States, that is, bring them under its sovereignty internationally speaking, is not competent to incorporate such areas in the United States, but that for this purpose the express or implied consent of Congress is necessary; and Third, that Congress in legislating for unincorporated Territories is not subject to many of the limitations which apply when it is legislating for the States and incorporated Territories.

It will be observed that as far as the general limitations upon the legislative powers of Congress are concerned, these four justices place the States and the incorporated Territories in the same class. Only the unincorporated

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<sup>2</sup> 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

Territories are by them excluded from the protection of such limitations as, for example, that Federal tax laws shall be uniform throughout the United States. The fifth Justice, Brown, who concurred with these four, did not, as we shall see, make any distinction between incorporated and unincorporated Territories, but excluded them all from the term "United States," and from the protection of all but the most fundamental of the constitutional limitations upon the powers of Congress. The constitutional rights which these limitations create, he asserted, do not belong to the citizens of any Territories until by an act of Congress they have been extended to them. Thus, while the four justices divide the domains of the United States into the three classes of States, Incorporated Territories and Unincorporated Territories; Justice Brown recognized only two categories, States and Territories.

It will have been seen that the net result of the decision in *Downes v. Bidwell*, whether we follow the reasoning of Justice Brown, or of the four justices who concurred in the judgment rendered, is that as to Territories which have not been incorporated into the United States (or, according to Justice Brown, over which the Constitution has not been extended by an act of Congress) Congress is not limited by some of the restrictions enumerated or implied in the Constitution. Just which of these limitations do not, in such cases, control Congress, it remains for the Supreme Court to determine in each particular case as the point arises.

In *Downes v. Bidwell* it was held that the restriction that "all duties, excises and imposts shall be uniform throughout the United States" does not apply.

### Hawaii

In *Hawaii v. Mankichi*<sup>3</sup> it was held that the provisions

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<sup>3</sup> 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. ed. 1016.



of the Fifth and Sixth Amendments with reference to indictment by a grand jury and trial by petit jury, also did not apply. The facts and questions of law involved in this case were these. The Joint Resolution of Congress of July 7, 1898, had provided for the annexation of the Hawaiian Islands "as a part of the territory of the United States, and subject to the sovereign dominion thereof." The Resolution, indeed, expressly declared that "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." After the annexation to the United States, Congress not having determined otherwise, the defendant in error, Mankichi, was tried for and convicted of manslaughter according to the usual course of procedure in force in the Republic of Hawaii prior to July 7, 1898, which course of procedure did not require the indictment to be found by a grand jury, and which permitted a less number than the entire twelve of the petit jury to convict. An application for a writ of habeas corpus having been made by Mankichi upon the ground that, according to the Constitution of the United States, no one might be tried for manslaughter except upon an indictment or presentment found by a grand jury, and the case having been appealed to the Supreme Court of the United States, that tribunal was called upon to determine: first, whether it was the intention and the necessary effect of the annexing Joint Resolution to make these constitutional provisions immediately applicable to the islands; and secondly, if it did not, whether it lay within the power of Congress or of the authorities of Hawaii to deny to the accused the rights in question. The court answered the first question in the negative, and the second in the affirmative.

## Alaska

In *Rassmussen v. United States*,<sup>4</sup> decided in 1905, it was held that Alaska had been incorporated into the United States, and, therefore, that the inhabitants were entitled to jury trial. The court did not, however, attempt to lay down any definite rule for determining when incorporation has taken place, but contented itself with quoting certain sentences from the opinion in *Dorr v. United States*,<sup>5</sup> and holding that the treaty by which Alaska had been acquired, and the legislation of Congress subsequent thereto, did not bring that Territory within the category of unincorporated Territories according to the test implied in the sentences quoted. This *Rassmussen* case is, however, significant, in that it exhibits the definite adherence of the court to the doctrine of the distinction between incorporated and unincorporated Territories.

In this *Rassmussen* case the attempt had been made to maintain the doctrine that, even if incorporated, Alaska was not entitled to the right in question for the reason that it had not been made an "organized" Territory. This contention, however, the court held clearly unsound. Incorporation and not organization, it was declared, is the test as to the general applicability of the Constitution. Justice Brown concurred, but, as might have been expected from his position in *Downes v. Bidwell*, held that the general applicability of the Constitution depended not upon the fact of incorporation, but upon whether Congress had by some expression of its will clearly shown that it intended that the particular provision of the Constitution should apply.

That the Thirteenth Amendment forbidding slavery and involuntary servitude except as punishment for crime

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<sup>4</sup> 197 U. S. 516; 25 Sup. Ct. Rep. 514; 49 L. ed. 862.

<sup>5</sup> 195 U. S. 138; 24 Sup. Ct. Rep. 808; 49 L. ed. 128.

applies in the unincorporated as well as the incorporated Territories, is clear, its language expressly extending its force not only to the United States but to "any place subject to their jurisdiction." Certain forms of slavery do, however, undoubtedly exist in some of the Philippine Islands, but there is of course no legality in this, and as soon as possible, the custom or practice will be suppressed, if, indeed, it has not already been suppressed.<sup>6</sup>

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<sup>6</sup> For other recent adjudications with reference to the Territories, see *Binns v. United States*, 194 U. S. 486; 24 Sup. Ct. Rep. 816; 48 L. ed. 1087; *Kepner v. United States*, 195 U. S. 100; 24 Sup. Ct. Rep. 797; 49 L. ed. 114; *Goetze v. United States*, 182 U. S. 221; 21 Sup. Ct. Rep. 742; 45 L. ed. 1065; *Dooley v. United States*, 183 U. S. 151; 22 Sup. Ct. Rep. 62; 43 L. ed. 128; *Warner, Barnes & Co. v. United States*, 197 U. S. 419; 25 Sup. Ct. Rep. 455; 49 L. ed. 816.

## CHAPTER XXII

### CITIZENSHIP IN THE TERRITORIES

#### **Effect of cession**

Whether or not inhabitants of territories ceded by one nation to another necessarily have, according to the principles of international law, the option of becoming citizens of the annexing State, or retaining their old citizenship, is a point upon which international law writers do not seem to be fully agreed. That, in the absence of treaty stipulation to the contrary, the citizenship of the inhabitants of ceded territory is to be that of the annexing state, is, however, generally admitted by American international law writers, and has been more than once declared by the United States Supreme Court.<sup>1</sup>

#### **Treaty provisions**

In all the treaties entered into by the United States whereby territory was acquired, prior to that with Spain in 1898, it was provided either that the inhabitants of the ceded territories remaining therein should be admitted as soon as possible to the enjoyment of all the rights, advantages and immunities of citizens of the United States, or that they should be "incorporated in the Union of the United States," or both. It cannot, however, be said with certainty, as has been maintained by some, that it was due to these provisions that the inhabitants of the ceded terri-

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<sup>1</sup> American Insurance Co. v. Canter, 1 Pet. 511; 7 L. ed. 242; Boyd v. Nebraska, 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

tories were collectively naturalized, for this point has never been squarely passed upon by the Supreme Court. . The undoubted purpose and the probable legal effect of these provisions was only to create an obligation on the part of the United States not to discriminate civilly against these people, and, when the conditions should warrant, to confer upon them full political privileges. The determination when this time had arrived was left to the discretion of Congress. Provisions similar to those of which we have been speaking are almost always inserted by all nations in treaties of cession at the instance of the ceding power, as a matter of equity, it being but just that in handing over to the control of another power citizens of its own, a State should, as far as possible, obtain a guarantee that they should not be civilly or politically oppressed.

By these treaties of cession entered into by the United States, the inhabitants of the ceded territories did become, however, United States citizens under the general rule quoted above, because those treaties contained no stipulations to the contrary.

In the treaty of peace with Spain which provided for the cession to the United States of Porto Rico, Guam and the Philippines, we find for the first time appearing a provision expressly asserting, that the cession of the islands is not to operate as a naturalization of their native inhabitants, but that the determination of their civil rights, and political status, is to be left to the subsequent judgment of Congress. Spanish subjects, natives of the Iberian Peninsula, but resident in the islands, are, however, given the right to elect whether or not they will retain their old citizenship or become American subjects.

In the Insular Cases it was held that the islands obtained from Spain have not been incorporated in the "United States." Their inhabitants have not been naturalized by statute, and the treaty with Spain expressly

refuses them citizenship. The whole question of their civil status thus depends upon whether or not they are citizens according to the provision of the Fourteenth Amendment, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." That is to say, it will depend upon whether the term "United States," as here employed, will be construed to include or exclude "unincorporated" Territories.

As has been said, this question has not been passed upon precisely, by the Supreme Court, but the positions taken in the Insular Cases would indicate that inhabitants of these insular possessions, though subject to the sovereignty of, and owing allegiance to, the United States, are not citizens within the strict constitutional sense. Certainly by the executive and legislative departments of the National Government the position has been taken that they are not.

### **Statutory provisions**

The citizens of Hawaii have been made citizens of the United States by statute enacted April 30, 1900.

The act of June 14, 1902, provides that no passport shall be granted or issued to, or verified for, any other persons than those owing allegiance, whether citizens or not, to the United States. Under this provision passports are now issued to citizens of Porto Rico and of the Philippines.

By the act of Congress of July, 1902, providing for the administration of civil government in the Philippine Islands all inhabitants thereof, continuing to reside there who were Spanish subjects at the time of the cession of the islands to the United States, and their children born subsequent thereto, and who have not elected to preserve their Spanish allegiance, are described as "citizens of the Philippine Islands." So similarly, in the act of April 12,

1900, establishing a civil government in Porto Rico, the phrase "citizens of Porto Rico" is employed, and the designation "citizens of the United States" avoided. And in the naturalization act of June 29, 1906, provision is made (§ 30) for the naturalization, under certain circumstances, of "persons not citizens who owe permanent allegiance to the United States."

In *Gonzales v. Williams*<sup>2</sup> it was held that a native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States is not an "alien" within the meaning of the act of Congress of March 3, 1891, providing for the detention and deportation of alien immigrants likely to become public charges. No position is taken by the court, however, with reference to the question of citizenship.

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<sup>2</sup> 192 U. S. 1; 24 Sup. Ct. Rep. 171; 48 L. ed. 317.

## CHAPTER XXIII

### FOREIGN RELATIONS: THE TREATY POWER

#### **Federal powers exclusive**

The exclusiveness of the Federal jurisdiction in all that concerns foreign affairs is deducible both from the national character of the General Government, and from the express provisions of the Constitution.

The States are expressly forbidden to "enter into any treaty, alliance or confederation," "to grant letters of marque and reprisal," or, unless Congress consents, to "lay any duty of tonnage, keep troops or ships of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will admit of no delay."

Upon the other hand, the General Government is expressly empowered "to provide for the common defense and general welfare of the United States;" "to regulate commerce with foreign nations;" "to make treaties;" "to establish an uniform rule of naturalization;" "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;" "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of the land and naval forces;" "to provide for the calling forth the militia to . . . repel invasions;" "to appoint ambassadors and other public ministers and consuls;" to adjudicate causes arising under treaties, and all cases affecting am-



bassadors, other public ministers and consuls, cases of admiralty and maritime jurisdiction, and cases between a State, or the citizens thereof, and foreign States, citizens and subjects. Finally, it is declared that: "This Constitution, and the laws of the United States that shall be made in pursuance thereof; and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution or the laws of any State to the contrary notwithstanding."

From these express grants of power to the General Government, and prohibitions of treaty powers to the States, the intention of the framers of the Constitution to invest the Federal Government with the exclusive control of foreign affairs is readily deducible.

### **Federal powers comprehensive**

The control of international relations vested in the General Government is not only exclusive, but all-comprehensive. That is to say, the authority of the United States in its dealings with foreign powers includes not only those powers which the Constitution specifically grants it, but all those powers which sovereign States in general possess with regard to matters of international concern. This general authority in the United States is fairly deducible from the fact that in its dealings with other States the United States appears as the sole representative of the American people; that upon it rests, therefore, the obligation to perform all the duties which international law imposes upon a sovereign State; and that, therefore, having those duties to perform it is to be presumed to have commensurate powers.<sup>1</sup>

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<sup>1</sup> The comprehensive character of the powers of the National Government with reference to foreign affairs has been especially

The reasoning of the court in maintenance of the principle that in all that concerns foreign relations the United States has the same plenitude of constitutional power as that possessed by other sovereign States is sound. An appeal, however, to the fact of "national sovereignty" as a source of Federal power is not a valid one outside of the international field. It cannot properly be resorted to when recognition of an international obligation on the part of the United States is not involved, and when, therefore, the matter is purely one relating to the reserved powers of the States or to the private rights of the individuals. To permit the doctrine to apply within these fields would at once render the Federal Government one of unlimited powers.

#### **The manner of exercise of the treaty-making power**

The Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

With respect to the manner in which treaty-making is, according to the Constitution, to be conducted, the first question that arises is as to the extent to which the Senate may properly participate not only in the ratification, but in the preliminary negotiation of international agreements.

In the same clause, indeed in the same sentence, of the

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asserted in a line of cases dealing with the exclusion from the United States of undesirable aliens and especially of the Chinese. See *Chinese Exclusion Cases*, 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068; *Ekiu v. United States*, 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905. See, also, *United States v. Jones*, 109 U. S. 513; 3 Sup. Ct. Rep. 346; 27 L. ed. 1015, as to the constitutional authority of Congress to provide for the occupation and annexation of the Guano Islands.

Constitution in which provision is made for entering into treaties, it is provided that the President "shall nominate and by and with the advice of the Senate shall appoint ambassadors, other public ministers and consuls," etc. Here the phraseology shows that the act of nominating the public officials mentioned, is clearly distinguished from their appointment. They are to be nominated by the President, but are to be appointed by the Senate and President. The negotiating of treaties is not, however, by the phraseology of the treaty clause thus sharply distinguished from their ratification as regards the Federal organs by which this negotiation and ratification are to be performed. The language is that the President "shall have power, by and with the advice and consent of the Senate, to make treaties," not that "he shall negotiate, and, with the consent of the Senate, ratify treaties."

As further indicative of an intended participation of the Senate in the negotiation of treaties, is the fact that in the Convention, until almost the last moment, it was agreed that the treaty-making power should be vested exclusively in the Senate, a body the membership of which it was thought at that time would remain comparatively small.

### **Negotiation of treaties**

Actual practice exhibits frequent instances in which the Senate has participated in the negotiation of treaties, particularly during the first years under the Constitution when the relations between the President and the Senate were especially close. After the first years under the Constitution, however, the practice on the part of the President of consulting the Senate with regard to the treaties to be negotiated, became an infrequent one, but yet not one wholly obsolete.<sup>2</sup>

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<sup>2</sup> See article in *Scribner's Magazine*, Jan., 1902, by Sen. Lodge, entitled "The Treaty-Making Power."

In a number of cases the Senate has by resolution suggested to the President that certain negotiations be initiated. Thus in 1835 the Senate requested the President to open negotiations with the Central American governments with a view to securing treaties granting protection to such individuals as might undertake the construction of an interoceanic canal. In 1888 President Cleveland was requested by the Senate to open negotiations with China for the regulation of immigration of subjects of that country into the United States. In 1880, by a concurrent resolution, the Senate and House of Representatives requested the Executive to seek the co-operation of other powers in providing for the amicable settlement by arbitration of disputes which could not be settled through the ordinary diplomatic channels. By an act of Congress, the President was, in 1902, advised and authorized to enter into certain treaty arrangements with reference to the construction of an interoceanic canal.

All of the instances cited above, are, however, by way of general exception to the rule that the negotiation of treaties is in the hands of the President. The Senate's function, so far at least as its formal action is concerned, is limited to the disapproval or ratification, with or without amendments, of the treaties after they have been agreed upon by the President and the chancellaries of the foreign countries concerned.

Though, as has just been said, the formal participation of the Senate as a body in the negotiation of treaties is not often now solicited, that body is, as a matter of fact, according to modern usage, frequently, indeed, it might be said, generally, kept well informed as to the progress of international negotiations by means of personal interviews between the Executive and prominent Senators, especially, of course, those serving upon the Committee on Foreign Affairs. In 1898 three of the five Commissioners ap-

pointed to negotiate the Treaty of Peace with Spain were Senators and members of this Committee.

The recognition by the United States of a status of belligerency, and the recognition of the sovereignty and independence of a foreign government are political acts, not subject to judicial review, and are performed by the President. At times the claim has been made that this power of recognition is one to be exercised at the dictation of Congress, but precedents are against the claim. It is to be presumed, however, that when the recognition of a status of belligerency or of the independence of a revolutionary government is likely to constitute a *casus belli* with some other foreign power, the President will be guided in large measure by the wishes of the legislative branch. Upon the other hand, it is the proper province of the Executive to refuse to be guided by a resolution on the part of the legislature if, in his judgment, to do so would be unwise. The legislature may express its wishes or opinions, but may not command.

### **The power of the Senate to amend treaties**

There would seem to be no question that, having the power either to approve or disapprove an international agreement negotiated by the President, the Senate has also the power, when disapproving a proposed treaty, to state upon what conditions it will approve; in other words, to amend any treaty submitted to it. Upon the other hand, it is equally within the province of the Executive to consider the amendment of a treaty by the Senate as a rejection of it. When, therefore, a treaty has been amended in the Senate, it is within the President's power to abandon the whole treaty project, or to reopen negotiations with the foreign country or countries concerned with a view to obtaining their consent to the changes desired by the Senate, or, finally, to begin *de novo* and at-

tempt to negotiate an entirely new treaty, which he may hope will secure senatorial approval. In case he decides to follow the second of these courses, namely, to secure the approval of the foreign country or countries to the amendments to the treaty project made in the Senate, and is successful in this, it would seem that the treaty need not be again submitted to that body for its approval, but may be at once promulgated.<sup>3</sup>

The approval of the Senate being essential to all treaties entered into by the United States, it has been held that all protocols, and explanations given by the Executive as to the meaning of treaty provisions, which have not been passed upon and approved by the Senate, are not to be considered as internationally binding upon the United States, or enforced in its courts. For this reason it is not constitutional for the President to insert in a treaty secret provisions which have not been approved by the Senate. Most of the written Constitutions of foreign powers have specific prohibitions with reference to secret provisions.

After a treaty has been signed by the commissioners appointed to negotiate it, or agreed upon by the departments of State of the countries concerned, there is no constitutional obligation upon the President to submit it to the Senate, and, even after submission to that body, he may withdraw it, as for instance was done by President Cleveland with reference to a reciprocity treaty with Spain which had been sent to the Senate in 1884 by President Arthur. In a like manner the Hawaiian Annexation treaty of 1893, and the Nicaraguan Canal Convention of 1884 were withdrawn for "re-examination" after having been sent to the Senate.

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<sup>3</sup> See Crandall, *Treaties: Their Making and Enforcement*, pp. 68 *et seq.* In *Haver v. Yaker*, 9 Wall. 32; 19 L. ed. 571, the court recognizes the right of the Senate to amend projects of treaties.

Even after being favorably acted upon by the Senate, it would appear that, under certain circumstances, the President may refuse to ratify a treaty. Thus, in 1888, when China proposed certain changes in an agreement with this country which had already been approved by the Senate, the President abandoned the entire project.

### **International agreements not requiring submission to the Senate**

Not all agreements entered into by the United States with foreign powers are held to be treaties in the sense in which that term is used in the treaty clause of the Constitution. Such agreements as are held not to be treaties in this sense, it has been the practice of the President, acting in pursuance of his general powers as Chief Executive or as authorized by congressional statute, to enter into and promulgate without submission to the Senate. Furthermore, in not a few instances the Senate has itself expressly conferred upon the President the power to contract with foreign powers with reference to specified matters.<sup>4</sup>

International correspondence is exclusively in the hands of the President, or his agent, the Secretary of State. Hence it is improper for any international documents to be addressed to, or sent directly to the Senate, or for any attempt to be made, in any way, by an agent of a foreign power to influence directly the action of the Senate upon a treaty that is pending before it or is later to be sent to it for its action thereupon. Upon the other hand, it is, of course, improper for the Senate or any other organ of the

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<sup>4</sup> See pamphlet, reprinted from the *Yale Review* by J. F. Barnett, entitled "International Agreements Without the Advice and Consent of the Senate;" article by J. B. Moore in the *Political Science Quarterly*, Sept., 1905, entitled "Treaties and Executive Agreements"; and article by C. C. Hyde in *Greenbag*, April, 1905, entitled "Agreements of the United States other than Treaties."

Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President. Thus, when in 1877 Congress passed two joint resolutions congratulating the Argentine Republic and the Republic of Pretoria upon their having established a republican form of government, and directing, in the one case, the Secretary of State to acknowledge the receipt of a dispatch from Argentine, and in the other to communicate with Pretoria, the President vetoed both resolutions.

By virtue of the power exclusively vested in him to conduct diplomatic negotiations between this and a foreign country, the President has, since early years, entered into numerous agreements with foreign chancellaries for the settlement of claims made by private American citizens against foreign governments. In a considerable number of cases these claims have been settled by means of arbitrations agreed upon between the foreign offices concurred.

In no case has the President attempted, without consulting the Senate, to adjust finally claims brought by foreigners against the United States. In no case, also, has the President, by executive action, attempted the settlement of claims set up by the United States in its own behalf.

The constitutional authority of the President, without consulting the Senate, to enter into protocols of agreement as the basis for treaties to be negotiated, is beyond question, and has repeatedly been exercised without demur from the Senate.

As the term indicates, a *modus vivendi* is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form. Continued and unquestioned practice supports the doc-



trine that these *modi vivendi* may be entered into by the President without consulting the Senate.<sup>5</sup>

In the exercise of his powers as Commander-in-Chief of the army and navy the President of the United States, from both necessity and convenience, is often called upon to enter into arrangements which are of an international character. These conventions do not require the approval of the Senate. A conspicuous example of international agreements thus entered into is the protocol signed at Peking in 1901. All protocols of agreement entered into for the purpose of furnishing a basis for treaties of peace, as for example, the Protocol of 1898 with Spain, come under this head. So do all conventions providing in time of war for an armistice, or the exchange of prisoners, etc.

The President's military powers exist in times of peace as well as during war. And thus, in 1817, the President, without obtaining the advice and consent of the Senate, was able, by an exchange of diplomatic notes, to arrange with England regarding the number of vessels of war to be kept by the two powers upon the Great Lakes. So also, upon his own discretion, the President is able to send American vessels of war to whatever ports he sees fit, whether for the purpose of friendly visits, of furnishing protection to American citizens or their property, or of making a "demonstration" in order to obtain desired action on the part of the State thus overawed.<sup>6</sup>

### Extraditions

The greatly preponderant weight of opinion is that, in

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<sup>5</sup> For instances, see Butler, *The Treaty-Making Power*, I, 369, note.

<sup>6</sup> By general treaties as well as by statutes the President is often given authority to enter into specific international agreements which do not need to be submitted to the Senate for its approval before they become effective. The constitutionality of this delegation of authority is considered in *Field v. Clark*, 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

the absence of authority expressly given him by treaty or statute, the President has not the constitutional right to extradite to a foreign country a fugitive to this country. The single instance in which the President has extradited without such authority expressly conferred upon him is the surrender to Spain by Lincoln in 1864 of one Arguelles.

Whether or not Congress has the power by statute to authorize the President to extradite fugitives to countries with which the United States has no subsisting treaty upon the subject is not certain, as there has been no instance of the exercise of such power. Reasoning upon general principles, however, there would seem to be no constitutional objection to such legislation.

## CHAPTER XXIV

### CONGRESSIONAL LEGISLATION FOR THE ENFORCEMENT OF TREATIES

#### **Auxiliary legislation often necessary**

Though all treaties, as declared by the Constitution, are parts of the supreme law of the land, they are not always, in whole or in part, self-executing, but require for their enforcement ancillary legislative action. Especially is this legislative assistance required when an expenditure of money is called for. The treaty-making power is able to obligate the United States internationally to the payment of sums of money, but is not able itself to appropriate from the United States treasury the amounts called for, or to compel the legislature to provide for their payment. The same is true as to other legislation which may be required in order to put a treaty into full force and effect. The moral and political obligation upon Congress to supply this legislation or to make the necessary appropriations is, however, exceedingly strong. As parts of the supreme law of the land, treaties rest upon a plane of equality with acts of Congress, but upon no higher plane. Resulting from this, it has been held in a number of well-considered cases that an act of Congress operates to repeal or annul prior treaty provisions inconsistent with it.<sup>1</sup>

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<sup>1</sup> *Edye v. Robertson* (Head Money Cases), 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798; *Chae Chan Ping v. United States*, 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068. See also cases cited by Butler, *Treaty-Making Power*, I, 86.

**Effect of treaties on existing statutes**

We have now to examine whether, without congressional direction or permission, it is competent for the treaty-making power to regulate a matter which it is within the legislative power of Congress to control; or, by international agreements, to alter arrangements which Congress has by statute already established.

That the treaty-making power extends to many subjects within the ordinary legislative powers of Congress there can be no doubt. The Supreme Court has, in a number of instances, declared that treaties and acts of Congress stand, as law, upon exactly equal planes, and, therefore, that the later treaty operates to supersede the earlier law, exactly, as we have seen, the later law has the effect of abrogating a prior inconsistent treaty.<sup>2</sup>

In fact, however, there have been few instances in which a treaty inconsistent with a prior act of Congress has been given full force as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject. Furthermore, with specific reference to commercial arrangements with foreign powers, Congress has explicitly denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and, in actual practice, Congress in every instance has succeeded in maintaining this point.

There would seem to be, however, in practice, one

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<sup>2</sup> Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Cherokee Tobacco Case, 11 Wall. 616; 20 L. ed. 227. See also United States v. Lee Yen Tai, 185 U. S. 213; 22 Sup. Ct. Rep. 629; 46 L. ed. 878, and cases there cited.

exception to the rule that the later treaty abrogates the prior inconsistent statute, and this is in reference to acts for raising revenue. The Constitution expressly declares that "all bills for raising revenue shall originate in the House of Representatives." Strictly interpreted this provision might be held to apply only to "bills," that is, to propositions for a statute, but in practice the spirit of the clause has been followed rather than its exact letter.<sup>3</sup>

After an account of the practice of the government and of discussions of the subject in Congress, Mr. Crandall, writing in 1904, says: "From this historical review it appears that, whatever may be the *ipso facto* effect of the treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation is expressly made dependent upon the action of Congress; and that in the recent Cuban treaty such a clause was inserted on the initiative of the Senate."<sup>4</sup>

It is to be observed, before leaving this subject, that in no case has the treaty-making power, whatever its actual concessions, ever admitted in full terms its inability to fix as laws matters which are within the legislative powers of Congress. Thus in 1902, Senator Cullom emphatically asserted that only with reference to the appropriation of money is legislative assistance needed in order that treaties may receive acceptance as laws in our courts.<sup>5</sup>

It is to be remarked, however, that in *Bertram v. Robert-*

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<sup>3</sup> See Moore's *Digest of International Law*, V, 223; and report of Senate Committee on Foreign Affairs, *Compilation of Reports of the Committee on Foreign Relations*, VIII, 36.

<sup>4</sup> *Treaties: Their Making and Enforcement*, 145.

<sup>5</sup> Butler, *Treaty-Making Power*, I, 457.

son,<sup>6</sup> and *Whitney v. Robertson*,<sup>7</sup> though the point is not expressly discussed, it would seem that the court impliedly held that a treaty might modify revenue laws, for in these cases the effect of treaties upon existing tariff laws is considered without a suggestion that the inquiry is an unnecessary one because of the inability of the treaty-making power to modify such statutes.

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<sup>6</sup> 122 U. S. 116; 7 Sup. Ct. Rep. 1115; 30 L. ed. 1118.

<sup>7</sup> 124 U. S. 190; 8 Sup. Ct. Rep. 456; 31 L. ed. 386.

## CHAPTER XXV

### THE CONSTITUTIONAL EXTENT OF THE TREATY-MAKING POWER

#### **Treaty-making power not expressly limited**

The treaty-making power is granted in the Constitution without any express limitations as to the subjects to which it may relate. And all treaties, without qualification, are declared to be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If, then, there are any limitations upon its extent, they must be found inherent to the nature of treaties themselves, or implied in other clauses of the Constitution, or in the very nature of the polity which that instrument is designed to create and maintain.

No treaty has ever been held unconstitutional in any court, Federal or State, in the United States. That there are, however, limits, despite the fact that in no case has there arisen the necessity for applying them in a court of law, would appear beyond question. From the early years of the present Government to the decision of the *Insular Cases* in 1901, the Supreme Court has, upon frequent occasions, stated, not only in general terms, but with reference to specific matters, that there are limits to the subjects that may, by treaty, be made the supreme law of the land.<sup>1</sup> And in *Downes v. Bidwell*<sup>2</sup> four of the majority

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<sup>1</sup> *New Orleans v. United States*, 10 Pet. 662; 9 L. ed. 573; *Pollard's Lessee v. Hagan*, 3 How. 212; 11 L. ed. 565; *Cherokee Tobacco Case*, 11 Wall. 616; 20 L. ed. 227; *DeGeofroy v. Riggs*, 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642, and cases there cited.

<sup>2</sup> 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088. For addi-

justices declare in their opinion that the treaty-making power is incompetent to incorporate annexed territory into the United States. And the minority justices assert that "a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal jurisdiction, would be simply void."

These *dicta* of the Supreme Court are really *obiter* in that in no case was a treaty provision held void. However, the statement being so often and so positively asserted it may be taken for granted that there are constitutional limits to the treaty-making power, and that when these limits are overstepped, the courts will interpose their veto.

### **The treaty-making power and the reserved rights of the States**

The supremacy of a Federal treaty over a conflicting State law, with reference to matters not reserved to the States, has not been questioned since the time it was established that a Federal statute, enacted within either the concurrent or exclusive constitutional competency of Congress, operates to nullify all inconsistent State legislation. In this respect, as the Constitution expressly declares, treaties and acts of Congress are upon precisely the same footing.<sup>3</sup>

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tional declarations by the Supreme Court that treaties are necessarily subordinate to the provisions of the Constitution, see *Ware v. Hylton*, 3 Dall. 199; 1 L. ed. 568; *United States v. The Peggy*, 1 Cr. 103; 2 L. ed. 49; *Lattimer v. Poteet*, 14 Pet. 4; 10 L. ed. 328; *Doe v. Braden*, 16 How. 635; 14 L. ed. 1090; *Thomas v. Gay*, 169 U. S. 264; 18 Sup. Ct. Rep. 340; 42 L. ed. 740. In *United States v. Wong Kim Ark*, 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890, the minority point out that the effect of the decision of the majority is to limit the treaty-making power with reference to the prevention of children of resident aliens, born within the United States, from becoming citizens of the United States.

<sup>3</sup> *Ware v. Hylton*, 3 Dall. 199; 1 L. ed. 568; *Fairfax v. Hunter*, 7 Cr.



It may, then, be considered as established that a treaty entered into by the Federal Government with respect to a matter within the Federal jurisdiction is supreme over a conflicting State law. This leads to the question whether, by an exercise of the treaty-making power, the Federal Government may regulate matters within the States which it may not control by an act of Congress, and if, in this respect, the treaty-making power is broader than the legislative, in what respects, and to what extents, it is broader.

Upon this point the declarations of the Supreme Court are not completely satisfactory. In various of its opinions this tribunal has explicitly asserted that the rights reserved by the Constitution from the control of the other departments of the Federal Government may not be infringed by its treaty-making power.<sup>4</sup>

Opposing, however, the *dicta* of these cases there is a line of cases in which treaties have been held constitutional with reference to matters which are admittedly not within the power of Congress to control. And, also, there have been numerous cases in which State laws with reference to matters within the ordinary legislative competency of the States, have been held void because of conflict with subsisting Federal treaties.<sup>5</sup>

Thus, in the case of *De Geofroy v. Riggs*,<sup>6</sup> it is declared:

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603; 3 L. ed. 453; *Chirac v. Chirac*, 2 Wh. 259; 4 L. ed. 234; *Hauenstein v. Lynham*, 100 U. S. 483; 25 L. ed. 628.

<sup>4</sup> *Prevost v. Greenaux*, 19 How. 1; 15 L. ed. 572; *License Cases* (dissenting opinion of Daniel), 5 How. 504; 12 L. ed. 256; *Passenger Cases* (dissenting opinion of Taney), 7 How. 283; 12 L. ed. 702.

<sup>5</sup> *Ware v. Hylton*, 3 Dall. 199; 1 L. ed. 568; *Hopkirk v. Bell*, 3 Cr. 454; 2 L. ed. 497; *Fairfax v. Hunter*, 7 Cr. 603; 3 L. ed. 453; *Chirac v. Chirac*, 2 Wh. 259; 4 L. ed. 234; *Lattimer v. Poteet*, 14 Pet. 4; 10 L. ed. 328; *Hauenstein v. Lynham*, 100 U. S. 483; 25 L. ed. 628. See also dictum in *Ward v. Race Horse*, 163 U. S. 504; 16 Sup. Ct. Rep. 1076; 41 L. ed. 244. See also note 8.

<sup>6</sup> 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection that should be afforded the citizens of one country owning property in another, and the manner in which the property may be transferred, devised or inherited, are fitting subjects for such negotiations and of regulation by mutual stipulations between the two countries. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.<sup>7</sup> But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

In a number of instances State laws with reference to matters ordinarily within State cognizance have been held void when in conflict with existing Federal treaties. Examples of this are laws denying the right of the alien to be employed by contractors upon public works, or to be employed by private corporations.<sup>8</sup>

How, then, are we to harmonize these declarations that the reserved rights of the States may not be infringed by

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<sup>7</sup> Citing *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525; 5 Sup. Ct. Rep. 995; 29 L. ed. 264.

<sup>8</sup> *Baker v. Portland*, 5 Sawyer, 566; *In re Tiburcio*, 6 Sawyer, 349; *In re Ah Chong*, 6 Sawyer, 451. Cf. *Proceedings of the Am. Soc. of International Law*, 1907, address by Prof. C. N. Gregory.

the treaty power with the fact that, in specific instances, the invasion of these rights has been upheld?

Strictly speaking, the two positions, thus absolutely stated, cannot be harmonized. There is no principle which can be stated that will bring the *dicta* quoted into consonance with the decisions referred to. Either the *dicta* denying to the treaty-making power the right to infringe State rights are wrong, and must be abandoned, or the decisions upholding such infringement were improper, and will not be followed in the future.

The author is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that properly relates to international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, when the necessity from the international standpoint arises the treaty-making power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

### **Implied limitations upon the treaty-making power**

Assuming, then, that the reasoning that has gone before is correct, it may be asked: Are we led to the conclusion that, in extent, the treaty-making power is without constitutional limits?

Briefly stated, the answer is that these limitations are to be found in the very nature of treaties. That is, that the treaty-making power may not be used to secure a regulation or control of a matter not properly and fairly a matter of international concern. It cannot be employed

with reference to a matter not legitimately a subject for international agreement, any more than can the States under a claim of an exercise of their police powers regulate a matter not fairly comprehended within the field of police regulation. Thus, while it might be appropriate for the United States, by treaty with England, to provide that English citizens living in the United States should have certain rights of property, or schooling privileges, etc., within the States, State law to the contrary notwithstanding, it would not be appropriate, and, therefore, would not be constitutional, for the United States by such a treaty to provide that all aliens, whether British subjects or not, should enjoy these rights within the States within which they might live. So likewise, it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution; or that a power now exercised by one of the departments of the General Government should be exercised by another department. For these are matters of domestic national law with which foreign powers have no concern. In short, the treaty-making power is to be exercised with constitutional *bona fides*.

The principle which has been stated, that, to be constitutionally valid, a treaty must have reference to a subject properly a matter of international agreement, excludes from the Federal treaty-making power the authority to disregard those prohibitions of the Constitution, express and implied, which are directed not to Congress but to the National Government as a whole.

One final point with reference to the treaty-making power deserves notice. This is that where, for its enforcement, a treaty requires ancillary legislation, Congress would seem to have the constitutional power to enact the needed laws, even though these may relate to matters not

within the general sphere of its legislative authority. For it is to be presumed that the General Government has the power to render effective a treaty which it has the constitutional power to enter into. A somewhat analogous case is the legislative power recognized to belong to Congress with reference to matters of admiralty and marine, because of the grant to the Federal Judiciary of jurisdiction over admiralty and maritime causes.<sup>9</sup>

### **The denunciation of treaties**

Though the Senate participates in the ratification of treaties, the President has at times exercised the authority, without asking for senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States. In important cases, however, it is usual for him to seek senatorial approval before taking action. But whether or not this approval be sought, the courts hold themselves bound by the denunciation, the existence or non-existence of a treaty being a political question the decision upon which by the political departments of the government is binding upon the judicial department.

### **Construction of treaties**

As to public rights the courts hold themselves bound by

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<sup>9</sup> That the treaty-making power is incompetent to "incorporate" foreign territory into the United States (*Insular Cases*) or to provide that children born within the United States of alien parents shall not be citizens of the United States (*United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. Rep. 456; 42 L. ed. 890) we have already seen. That the treaty-making power may alienate territory would seem to be certain. See *Willoughby On the Constitution*, § 219. See also the same work, §§ 220-222, for a discussion of constitutional questions connected with the violation of treaties, whether by affirmative acts upon the part of the United States, by failure of Congress to enact the necessary ancillary legislation, by subsequent repealing statute, or by the declaration of the courts that they are unconstitutional and void of legal force.

the construction given to treaties by the political departments. As to private rights, however, arising under treaties in force, and even as to public rights when these are inseparable from private rights, the courts exercise independent judgment as to the meaning to be given to treaty provisions.

## CHAPTER XXVI

### THE AMENDMENT OF THE FEDERAL CONSTITUTION

#### **The amending clause**

The amendment of the Federal Constitution, while politically a subject of great importance, has given rise to few legal adjudications.

Article V of the Constitution provides: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as parts of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that two methods for proposing, as well as two methods for ratifying proposed amendments are provided. In practice, however, the fifteen amendments which have been added to the Constitution as originally adopted have all been proposed by Congress and that body has in each instance provided for ratification by the State legislatures.

When proposing amendments it has been held that two-thirds of those present in the Houses of Congress and not two-thirds of their entire membership is required.

The requirement of a two-thirds vote applies only as to the vote on the final passage of the proposal. Proposed amendments, it has therefore been held, may be amended by a majority vote, but two-thirds are required when one House is voting finally to concur in proposals of the other House.<sup>1</sup>

The President's approval of a proposed amendment is not required. In *Hollingsworth v. Virginia*<sup>2</sup> the court without argument say: "The negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the Constitution."

In scope the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate. It has by some been argued that even this limitation may be evaded by adopting a constitutional amendment eliminating this limitation upon the amending power, and thus opening the way to subsequent amendments providing for an unequal senatorial representation of the States.<sup>3</sup>

It would seem that a State legislature which has rejected an amendment proposed by Congress, may later reconsider its action and give its approval.<sup>4</sup> This in fact was done by several States with reference to the Fourteenth Amendment, and the ratifications thus given were accepted. That a ratification once given may not be withdrawn would also seem to be settled by the action taken by the

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<sup>1</sup> Hinds *Precedents of the House of Representatives*, V, §§ 7029-7039.

<sup>2</sup> 3 Dall. 378; 1 L. ed. 644.

<sup>3</sup> Cf. Von Holst, *Constitutional Law of the United States*, 31, note.

<sup>4</sup> Jameson, *The Constitutional Convention*, § 576.



Federal authorities in counting among those ratifying the Fourteenth Amendment certain States which, having ratified, later attempted to reverse this action.<sup>5</sup>

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<sup>5</sup> Jameson, *Id.*, §§ 577-584. For an excellent treatment of the various constitutional questions that have been raised in the States with reference to the amendment of their several Constitutions, see Dodd, *The Revision and Amendment of State Constitutions* (1910).

## CHAPTER XXVII

### CONGRESS—ITS ORGANIZATION: PRIVILEGES OF MEMBERS

The first section of Article I of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The following sections of this article provide for the composition and organization of these two branches of the national legislature and enumerate the powers which they may collectively and severally exercise. In the present chapters we shall be concerned with the constitutional provisions for the organization of Congress.

#### **Qualifications for senators and representatives**

It is required by the Constitution that Representatives shall have attained the age of twenty-five years, have been seven years citizens of the United States, and be, when elected, inhabitants of the State in which they are chosen. Senators are required to be thirty or more years of age, to have been nine years citizens of the United States, and to be, when elected, inhabitants of the State for which they are chosen.

It is furthermore provided by the Constitution that "no person holding an office under the United States shall be a member of either house during his continuance in office."

Furthermore, by § 3 of the Fourteenth Amendment it is declared that: "No person shall be a Senator or Representative in Congress, or Elector of President and

Vice-President, or hold an office, civil or military, under the United States, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.”<sup>1</sup>

It will be observed that habitancy and not mere residency in a State is required. Habitancy implies greater permanency than does residence. “A man’s residence is often a legal conclusion from statements showing his intention. Habitancy is a physical fact which may be proved by eyewitnesses.”<sup>2</sup>

The constitutional provision is that habitancy shall exist at the time of election. It is thus legally possible for a member of Congress, after election, to become an inhabitant of another State without thereby forfeiting his seat.

### **Qualifications determined by Congress**

Though essentially a judicial function the conclusive determination as to whether the constitutional qualifications for membership have been met is, by the Constitution, placed in the hands of each of the two Houses of Congress. It thus happens that, though neither House may formally impose qualifications additional to those mentioned in the Constitution, or waive those that are

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<sup>1</sup> Congress has removed this disability from all, or practically all persons suffering from it because of participation in the Civil War. Delegates from the Territories who are given the right to sit and speak but not to vote in the House of Representatives have their qualifications and terms of office determined by the Congress.

<sup>2</sup> Foster, *Commentaries*, § 62.

mentioned, each may in practice do either of these things. For example, in 1900, the House excluded Brigham H. Roberts of Utah because of various charges brought against him, none of which, however, alleged a constitutional disqualification. In this case it was strenuously argued that, having the necessary constitutional qualifications, Roberts should be admitted to membership, and then if the House should see fit, he might be expelled by a two-thirds vote.<sup>3</sup> For the right to expel, it is admitted, is absolute, and may be exercised for any reason which the House thinks adequate. The House, however, by a large majority, voted to exclude Roberts.<sup>4</sup>

It is plain that no State may add qualifications to those required by the Constitution of members of Congress. Thus in 1865, the governor of a State having refused to issue credentials to the rival claimants, because they were disqualified under provisions of the State Constitution to membership in the House, the House seated the one shown *prima facie* by official statement to have a majority of votes.<sup>5</sup> Similar action was taken by the Senate the same year.

The disqualification of a member of Congress, it has been held, does not entitle the person receiving the next highest vote, to his seat.<sup>6</sup>

Members who have already taken the oath may, it has been held, be unseated by a majority vote. That is to say, disqualification being shown the process of expulsion, which requires a two-thirds vote, is not needed.<sup>7</sup>

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<sup>3</sup> Const., Art. I, § 5, cl. 2.

<sup>4</sup> For a full statement of the arguments *pro* and *contra* in this important case, see House Rpt. 85, 56th Congress, 1st Session. Also Hinds *Precedents of the House of Representatives*, Vol. I.

<sup>5</sup> Hinds, § 415. Story's *Commentaries*, §§ 623-629.

<sup>6</sup> Hinds, § 424.

<sup>7</sup> Hinds, § 424.

In contested election cases, each House may examine witnesses, compel testimony and the production of papers, and punish witnesses for contempt.<sup>8</sup> Imprisonment for contempt must, however, cease with the adjournment of the Congress which orders it, for with the dissolution of that body its authority necessarily ceases.<sup>9</sup>

### **Disqualification of congressmen to hold Federal office**

The second clause of § 6 of Article I of the Constitution provides that: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time, and no person holding any office under the United States shall be a member of either House during his continuance in office."

In pursuance of this provision members of Congress have had their seats declared vacant for accepting commissions as officers of the volunteer and regular army forces of the United States. Visitors to academies, directors and trustees of public Federal institutions appointed by law, are not held disqualified.<sup>10</sup>

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<sup>8</sup> *Kilbourn v. Thompson*, 103 U. S. 168; 26 L. ed. 377.

<sup>9</sup> *Anderson v. Dunn*, 6 Wh. 204; 5 L. ed. 242. For historical accounts of the manner in which contested elections in Congress have been considered, see *Journal of Social Science*, 1870, p. 56; and *Political Science Quarterly*, XX, 421. In the case of *Re Loney*, 134 U. S. 372; 10 Sup. Ct. Rep. 384; 33 L. ed. 949, it was held that a notary public or other State officer designated by Congress to take depositions in contested election cases acts under authority of Congress and that perjury committed before him is an offense exclusively cognizable in the Federal courts.

<sup>10</sup> House Rpt. 2205, 55th Cong. 3d Sess. In *United States v. Hartwell*, 6 Wall. 385; 18 L. ed. 830, it is declared that "an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."

The House has also held that a contractor under the Federal Government is not constitutionally disqualified as a member.

A State office does not disqualify for membership. Thus, for example, Senator La Follette held the office of Governor of Wisconsin until January, 1906, although the Senate, after his election to that body, met in extra session the preceding March. Senator La Follette did not, however, appear in the Senate or take the oath until January 4, 1906.

Members-elect, it has been held, may defer until the meeting of Congress their choice between their seats and incompatible offices to which they may have been elected or appointed.<sup>11</sup>

The seat of a member who has accepted an incompatible office may be declared vacant by a majority vote.<sup>12</sup>

### **Privileges of members of Congress**

The first clause of the Sixth Section of Article I of the Constitution provides: "The Senators and Representatives . . . shall in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same, and for any speech or debate in either house, they shall not be questioned in any other place."

The exemption from arrest thus given is now of little importance, as arrest of the person is now almost never authorized except for crimes which fall within the classes exempt from the privilege. The words "treason, felony and breach of the peace" have been construed to mean all indictable crimes.<sup>13</sup>

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<sup>11</sup> Hinds, § 492.

<sup>12</sup> Hinds, § 504.

<sup>13</sup> *Williamson v. United States*, 207 U. S. 425; 28 Sup. Ct. Rep.

As regards the freedom of the members of Congress from prosecution for words spoken in either House, no comment is needed, except to observe that this privilege does not extend to the outside publication by a member of libelous matter spoken in Congress. As Story observes: "No man ought to have a right to defame others under color of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation and invade the repose of other citizens."<sup>14</sup>

It may be further observed that the constitutional immunity extends to witnesses appearing before committees of Congress, and, probably, to petitions, and other addresses to that body.<sup>15</sup>

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163; 52 L. ed. 278. Also, Hinds, § 2673. In *Kilbourn v. Thompson*, 103 U. S. 168; 26 L. ed. 377, is considered the personal liability of the individual members of Congress who had participated in a commitment for contempt which commitment was beyond the constitutional power of Congress.

<sup>14</sup> *Commentaries*, § 863.

<sup>15</sup> See the excellent paper by Mr. Van Vechten Veeder entitled "Absolute Immunity in Defamation: Legislative and Executive Proceedings," in the *Columbia Law Review*, Feb., 1910.

## CHAPTER XXVIII

### ELECTION OF MEMBERS OF CONGRESS

#### **Their apportionment among the States**

The Constitution provides that the House of Representatives shall be composed of members chosen every second year by the people of the several States, and that they shall be apportioned among the States according to their several populations, the whole number of persons in each State, excluding Indians not taxed, being counted. The Fourteenth Amendment further provides that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive or judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This amendment thus leaves it within the constitutional power of the States to place such restrictions as they may choose upon the exercise of the suffrage within their limits, but subject to a reduction in the number of representatives to which they are entitled in Congress to the extent to which the right to vote is denied to adult male inhabitants, citizens of the United States.

The Fifteenth Amendment, adopted two years later,



places the absolute prohibition upon the States that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color or previous condition of servitude."

As is well known, most of the Southern States have, by various provisions inserted in their several Constitutions, in large measure eliminated the negro vote. This has led to a certain amount of agitation both in the public press and in Congress for the enforcement of the reduction of representation clause of the Fourteenth Amendment, but as yet no decisive steps have been taken.

### **Educational qualifications**

In various States of the Union property, educational, and other qualifications upon the right to vote have been established. These limitations upon adult male suffrage have not, however, been held to warrant an application of the reduction of representation clause of the Fourteenth Amendment. To quote the words of Cooley: "To require the payment of a capitation tax is no denial of suffrage, it is demanding only the preliminary performance of a public duty and may be classed, as may also presence at the polls, with registration, or the observance of any other preliminary to insure fairness and protect against fraud. Nor can it be said that to require ability to read is any denial of suffrage. To refuse to receive one's vote because he was born in some particular country rather than elsewhere, or because of his color, or because of any natural quality or peculiarity which it would be impossible for him to overcome, is plainly a denial of suffrage. But ability to read is within the power of any man, it is not difficult to attain it, and it is no hardship to require it. On the contrary the requirement only by indirection compels one to appropriate a personal benefit he might otherwise neglect. It denies to no man the suffrage, but the privilege

is freely tendered to all, subject only to a condition that is beneficial in its performance and light in its burden. If a property qualification, or the payment of taxes on property when one has none to be taxed, is made a condition to suffrage, there may be room for more question."<sup>1</sup>

### Mode of apportionment

In the first Congress representatives were apportioned among the States according to a rough estimate as to their respective populations. Since that time new apportionments have been based upon the figures of the decennial censuses.

The first apportionment bill passed by Congress was vetoed by President Washington as unconstitutional in that it provided for a representative for each thirty thousand of population, the minimum fixed by the Constitution, and also an additional number to the States having the largest fractions left over after the division was made.

Until 1842 fractions of populations left over by dividing the populations of the several States by the number selected for determining the number of Representatives, went unrepresented. Since that time, however, where these fractions have exceeded a half of the ratio number, an additional representative has been allowed.

### Congressional districts

The division of the States into congressional districts for the purpose of selecting representatives is left to the State legislatures. Congress has, however, provided that

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<sup>1</sup> *Principles of Constitutional Law*, ed. 1898, p. 292. The State courts have very generally held that reasonable registration and other laws for the protection of the voter against fraud, intimidation, ignorance, etc., are not unconstitutional under their several State Constitutions, as adding to the qualifications there laid down. See Cooley, *Constitutional Limitations*, 7th ed., Chapter XVIII.

these districts shall be composed of contiguous territory. It has become an established rule of political practice, though not one of constitutional obligation, that a representative shall be a resident of the district in which he is elected. Representatives are, however, occasionally elected by districts in which they do not reside, and in such cases there has been no question as to their right to sit. In certain cases, congressmen at large, that is, from the whole State, are elected. This happens when a State has not been divided into districts, or where, after a reapportionment, additional representatives have been allotted to a State and that State has not redistricted itself so as to provide the necessary additional districts. In such cases, of course, only the additional representatives are elected at large.

### **Suffrage qualifications**

The Constitution provides that for the election of Representatives to Congress, "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." This places the regulation of the suffrage wholly within the control of the several States, except for the restriction placed upon them by the Fifteenth Amendment. There thus exists the rather curious fact that the National Government, though able to control its citizenship by naturalization, is not able to confer the suffrage for the election even of its own officials; whereas the States may confer, and, indeed, in a number of instances, have conferred, this suffrage upon persons not citizens of the United States.

That the suffrage is not a necessary incident of Federal citizenship is declared by the Supreme Court in *Minor v. Happersett*,<sup>2</sup> a case in which it was argued that a woman,

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<sup>2</sup> 21 Wall. 162; 22 L. ed. 627. See also *United States v. Reese*, 92

a citizen of the United States, was, as such, entitled to a vote.

Although, as appears from the foregoing, the right of determining the conditions upon which the suffrage is granted lies exclusively within the discretion of the several States, subject only to the limitation of the Fifteenth Amendment, it may happen that State suffrage laws may be rendered invalid because in violation of certain other general limitations laid upon the States. Thus, for example, a disfranchising law, operating as to particular individuals as a bill of attainder, or as an *ex post facto* law, or as tending to destroy a republican form of government in the State, or as favoring the citizens of certain States above those of other States, would probably be held void.<sup>3</sup>

A distinction is to be made between the right to vote for Representatives in Congress and the conditions upon which that right is granted. In the preceding paragraphs it has been shown that the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined, is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that Representatives shall be elected by those who have the right in each State to vote for the members of the most numerous branch of the State legislature. The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their own several State legislatures.<sup>4</sup>

U. S. 214; 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542; 23 L. ed. 588; *Pope v. Williams*, 193 U. S. 621; 24 Sup. Ct. Rep. 573; 48 L. ed. 817, and *Neal v. Delaware*, 103 U. S. 370; 26 L. ed. 567.

<sup>3</sup> *Pope v. Williams*, 193 U. S. 621; 24 Sup. Ct. Rep. 573; 48 L. ed. 817.

<sup>4</sup> *Ex parte Yarbrough*, 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274; *Wiley v. Sinkler*, 179 U. S. 58; 21 Sup. Ct. Rep. 17; 45 L. ed. 84.

**Federal control of congressional elections**

According to the Constitution, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." <sup>5</sup>

In this clause sufficient authority is given the Federal Government, should it see fit, to assume entire and exclusive control of elections of Senators and Representatives; to establish by acts of Congress the regulations governing the same, and to apply and enforce these regulations by Federal officials and tribunals.

The United States government did not exercise any of the power thus given it until 1842, when conceiving the system employed in some States of electing all the members of the House of Representatives upon a general ticket, (that is, one according to which each voter voted for as many Representatives as there were Representatives to be elected from his State) gave an undue power to the political party in the majority in the State, Congress enacted a law declaring that each member should be elected by a separate district composed of contiguous territory.<sup>6</sup> In 1866 an act was passed regulating the election of Senators by the State legislatures. In 1873 Congress again acted, providing by law that the election of Representatives in all of the States should occur upon the same day, the Tuesday following the first Monday in November, 1876, and on the same day of every second year thereafter.<sup>7</sup> In like man-

<sup>5</sup> Art. I, § 4, cl. 1.

<sup>6</sup> 5 Stat. at L. 491.

<sup>7</sup> By act of March 3, 1875, this provision was made, "not to apply to any State that has not yet changed its day of election and whose Constitution must be amended in order to effect a change in the day of election of State officers in said State." The elections in the States of Maine, Vermont, and Oregon are held under this provision."

ner Congress fixed the day for the election of presidential electors.

By act of 1872, amended by that of February 14, 1899, it is provided that "all votes for Representatives in Congress must be by written or printed ballot or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect."<sup>8</sup>

Other Federal laws prohibit interference in elections by Federal troops or army or navy officers;<sup>8</sup> and by the law of 1870 it is provided generally at all elections that no persons shall be prevented from voting because of race, color or previous condition of servitude.<sup>9</sup>

A general law enacted in 1870 (amended in 1871), entitled an act "To enforce the Rights of Citizens of the United States to Vote in the Several States of the Union," while not itself establishing positive regulations of its own, provided for the appointment of marshals and supervisors of elections to see to it that the State laws governing elections of Representatives to Congress were fairly and effectively executed.<sup>10</sup>

This right of oversight was, however, resisted by some of the States upon the ground that, though the United States might establish regulations of its own, appoint officials to execute them, and compel the officials of the State as well as private citizens to conform to them, it had no right or power to control State officials in the execution of the laws enacted by their own States, even when those laws related to the election of members of the National Legislature.

This controversy reached a judicial settlement in the

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<sup>8</sup> Rev. Stat., §§ 2003, 5530, 5528.

<sup>9</sup> Rev. Stat., § 2004. This law was enacted under authority given by the Fifteenth Amendment.

<sup>10</sup> Repealed, Feb. 8, 1894.

case of *Ex parte Siebold*,<sup>11</sup> decided in 1879, in which the Federal authority was upheld, the court holding that "the State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress.

In *Ex parte Clarke*<sup>12</sup> and *Ex parte Yarbrough*<sup>13</sup> the doctrine declared in Siebold's case is reaffirmed, the court saying in the latter case, "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect its elections from violence and corruption."

### **Enforcement clause of the Fifteenth Amendment**

By the second section of the Fifteenth Amendment Congress is given power to enact laws necessary for the enforcement of the prohibitions expressed in the first section.

The Federal authority thus granted, it is to be observed, has reference to all elections whether State or Federal. In this respect it is thus much broader than that given in § 4 of Article I. In other respects, however, the power granted is much narrower, for it authorizes Federal intervention only in cases where the right to vote has been denied or abridged on account of race, color or previous condition of servitude. Thus in *United States v. Reese*<sup>14</sup> an act of Congress which made it a crime to hinder, delay or restrict any citizen in doing any act to qualify him to vote or in voting at an election, was held void because its operation was not confined to cases in which the inter-

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<sup>11</sup> 100 U. S. 371; 25 L. ed. 717.

<sup>12</sup> 100 U. S. 399; 25 L. ed. 715.

<sup>13</sup> 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274. In this case the law of 1870 was held to support an indictment charging a conspiracy to intimidate a citizen of African descent from voting. See Rev. Stat., §§ 2208, 5520.

<sup>14</sup> 92 U. S. 214; 23 L. ed. 563.

ference was on account of race, color or previous condition of servitude.

In *James v. Bowman*<sup>15</sup> it was finally determined by the Supreme Court that the prohibition of the Fifteenth Amendment applied not to private but only to State action. Therefore the court held void an act of Congress which provided for the punishment of individuals who by threats, bribery or otherwise should prevent or intimidate others from exercising the right of suffrage as guaranteed by the Fifteenth Amendment.

### **Disfranchisement clauses of the Southern States**

As has been before adverted to, most, if not all, of the Southern States in which the negro population is very considerable, have, by means of constitutional amendments or in Constitutions newly adopted, secured in effect the almost total disfranchisement of their colored citizens. This, however, has been done, not by disfranchisement provisions expressly directed against the negroes, but by requiring all voters to be registered, and by placing conditions upon registration which very few negroes are able to meet, or, at any rate, to satisfy the registration officers that they do meet them.

If the courts may freely go behind the terms of a constitutional clause to discover its intent, and to construe it by that intent, or if they may test its validity by its actual operation in practice, it would seem that a possible opportunity is afforded for holding void some at least of the disfranchising clauses of the Constitutions of the Southern States. As yet, however, no case has been brought before the Supreme Court in which the court has consented to make this examination. As to the circumstances under which the court will consent to go back to the terms of a law, to determine its real intent and effect, two interesting

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<sup>15</sup> 190 U. S. 127; 23 Sup. Ct. Rep. 678; 47 L. ed. 979.



cases are *Yick Wo v. Hopkins*<sup>16</sup> and *Williams v. Mississippi*.<sup>17</sup> In the former case the law or ordinance in question was held void in that it attempted to give to an administrative officer an arbitrary discretionary power, and also in that an actual arbitrary discriminating use of that authority was shown. In *Williams v. Mississippi* the court declined to hold void the State law in question, the law being upon its face not in violation of the equal protection clause of the Fourteenth Amendment, and no discrimination in fact being proved. In *Yick Wo v. Hopkins* the court say: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution." This doctrine, however, the court say in the *Williams* case is not applicable to the Constitution of Mississippi and its statutes. "They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."<sup>18</sup>

### Election of Senators

The Constitution provides that Senators in the Federal

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<sup>16</sup> 118 U. S. 356; 6 Sup. Ct. Rep. 1064; 30 L. ed. 220.

<sup>17</sup> 170 U. S. 213; 18 Sup. Ct. Rep. 583; 42 L. ed. 1012.

<sup>18</sup> For other attempts to obtain judicial pronouncements upon the constitutionality of these disfranchising clauses in the State Constitutions, see *Giles v. Harris*, 189 U. S. 475; 23 Sup. Ct. Rep. 639; 47 L. ed. 909; *Giles v. Teasley*, 193 U. S. 146; 24 Sup. Ct. Rep. 359; 48 L. ed. 655; *Jones v. Montague*, 194 U. S. 147; 24 Sup. Ct. Rep. 611; 48 L. ed. 913. For a general discussion of this question, and the possibility of effective congressional action, see the article by Hon. John C. Rose in the *American Political Science Review*, I, 41, entitled "Negro Suffrage, the Constitutional Point of View."

Congress shall be chosen by the legislatures of the several States, and that "times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but that Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Not until 1866 did Congress exercise the control over the election of Senators thus given it. Prior to that date the Senate had recognized the validity of elections based on majority votes in joint conventions of the two houses of the State legislatures, where a concurrent choice of the two houses sitting separately was not obtained. It was held, however, in the case of James Harlan, 1857, that in such joint conventions a quorum of both houses must be present.

By the act of 1866 the entire matter was federally determined. The text of this law is given in the footnote.<sup>19</sup>

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<sup>19</sup> 40 Rev. Stat., §§ 14-19.

Section 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

Section 15. Such election shall be conducted in the following manner: Each house shall openly by *viva-voce* vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a *viva-voce* vote

When there is a dispute as to which of two contesting State bodies is the *de jure* legislature, the United States Senate, while having the power to exercise its own judgment, will ordinarily recognize that body which is accepted as *de jure* by the other State authorities.

### Vacancies in the Senate

It is provided by the Constitution that if vacancies in the Senate "happen by resignation or otherwise, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

There has been considerable difference of opinion as to the proper construction to be given to the term "happen" as employed in the foregoing constitutional clause. By some it has been argued that a vacancy "happens" whenever, for any reason whatever, there is a vacancy in the representation of a State in the Senate. By others, it is asserted, that where a State legislature has had the opportunity to elect a Senator and has failed to do so, it cannot be said that a vacancy has "happened," but that it has been present and brought about by the non-action of the State electoral body, and that that body has thus impliedly shown that it does not desire the vacancy to be filled. This was the position taken by the Senate in 1900 in the case of Senator Quay from Pennsylvania.

The senatorial practice has not been uniform in respect to executive appointments to fill vacancies, but its action

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of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected.

in the Quay case has probably determined the doctrine for the future.

### **Vacancies in the House of Representatives**

When vacancies happen in the representation from any State, it is provided that the executive authority thereof shall issue writs of election to fill such vacancies.

Vacancies are occasioned by death, by resignation, or by acceptance of a disqualifying office.

## CHAPTER XXIX

### THE PROCESS OF LEGISLATION AS CONSTITUTIONALLY DETERMINED

#### **Constitutional provisions**

To a certain extent the manner of conducting business in Congress, and the processes of legislation are determined by the Constitution. It is provided that the Vice President shall be the president of the Senate, but shall have no vote except in case of a tie. The Senate, however, is empowered to choose its other officers, including the President *pro tempore* to preside in the absence of the Vice President or when he is exercising the office of President of the United States. The House is empowered to choose all of its officers, including the presiding officer, the Speaker.

It is required that Congress shall assemble at least once in every year, and that such meeting shall be on the first Monday in December, unless by law a different day is appointed.

A majority of each House is fixed as a quorum to do business, but a smaller number is competent to adjourn from day to day, and to compel the attendance of absent members in such manner and under such penalties as each House may provide.

Each House is authorized to determine the rules of its procedure, to punish its members for disorderly behavior, and with the concurrence of two-thirds to expel a member.

Neither House may, without the consent of the other

House, adjourn for more than three days, nor to any other place than that in which the Houses are sitting.

Each House is required to keep a journal of its proceedings, and from time to time to publish the same, excepting such parts as may in its judgment require secrecy; and it is ordered that, at the desire of one-fifth of those present, the yeas and nays of members of either House on any question shall be entered on this journal.

The foregoing constitutional provisions impose duties upon and grant powers to the two Houses of Congress, the fulfillment and exercise of which are placed within the discretion of the Houses themselves. Very few questions arising under these clauses have, therefore, or could have been, brought before the courts. One important point has, however, been raised and deserves attention. This is discussed in the next section.

### **Conclusiveness of the records of congressional proceedings**

In a few instances the validity of laws purporting to have been enacted by Congress has been questioned upon the ground that they have not, in fact, been enacted by that body in accordance with the requirements of the Constitution. This has necessitated the examination of the records of the proceedings of Congress and a determination of the evidential value to be given to those proceedings.

In *Field v. Clark*<sup>1</sup> it was contended by the appellants that an enrolled act in the custody of the Secretary of State, and appearing upon its face to be a law enacted by Congress, was a nullity, because, as was shown by the records of proceedings in Congress, and the reports of committees, including that of the committee on conference, a section of the bill as finally passed was not in the bill authenticated by the signatures of the presiding officers of

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<sup>1</sup> 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

the two Houses and signed by the President. The court, however, declared that the attestation of the Speaker of the House and of the President of the Senate, and signature of the President of the United States, and the deposit of a measure as a law in the public archives are to be taken as unimpeachable evidence that the constitutional requirements for legislation have been satisfied, and the measure as thus certified to has received the approval of the legislative branch of the government. The opinion concludes: "We are of the opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either House, from the reports of committees, or from other documents, printed by authority of Congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled Act in the custody of the State Department."

In *United States v. Ballin*<sup>2</sup> the evidential value of records of congressional proceedings was again considered, the court saying: "Assuming that . . . reference may be had to the Journal . . . and assuming, though without deciding, that the facts which the Constitution requires to be placed on the Journal may be appealed to in the question whether a law has been legally enacted, yet if reference may be had to such Journal, it must be assumed to speak the truth."

### **Constitutional force of rules of the House and Senate**

In *United States v. Ballin* was also raised an interesting question as to the constitutional validity of a certain rule of procedure adopted by the House of Representatives. As to this the court, in its opinion, say: "The Constitution empowers each House to determine its rules of pro-

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<sup>2</sup> 144 U. S. 1; 12 Sup. Ct. Rep. 507; 36 L. ed. 321.

ceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other method would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

### Revenue measures

The Constitution provides that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." <sup>3</sup>

This provision has given rise to frequent controversies between the two Houses of Congress, but has but seldom been passed upon by the courts. No formal definition of a revenue measure has been given by the Supreme Court, but in *Twin City National Bank v. Nebeker* <sup>4</sup> the court, in effect, held that a bill, the primary purpose of which is not the raising of revenue, is not a measure that must originate in the House, even though, incidentally, a revenue will be derived by the United States from its execution.

The House has, upon a number of occasions, refused to agree to or to consider senatorial amendments to revenue

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<sup>3</sup> Art. I, § 7, cl. 1.

<sup>4</sup> 167 U. S. 196; 17 Sup. Ct. Rep. 766; 42 L. ed. 134.



measures upon the ground that the amendments have enlarged the scope or changed the character of the measure as originated in the House. Especially has the House denied, and the Senate insisted upon its right to originate measures which repeal a law or portion of a law imposing taxes, duties, imposts or excises.<sup>5</sup>

It would seem that the Senate has full power to originate measures appropriating money from the Federal treasury. This right has at times been denied by certain members of the House,<sup>6</sup> but the House has not itself formally adopted this negative view. In *Flint v. Stone Tracy Co.*,<sup>7</sup> the court say with reference to the corporation tax law which constitutes § 38 of the Tariff Act of August 5, 1909, and which originated in the Senate as an amendment to the law as passed by the House, that the act itself having originated in the lower branch of Congress, and the amendment being germane to the subject-matter of the bill, it was not beyond the power of the Senate to propose it.

### **Presidential participation in lawmaking**

The duties and powers of the President with reference to the enactment of laws are stated in Clause 2 of § 7 of Article I of the Constitution.

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<sup>5</sup> See generally upon this subject Hind's *Precedents of the House of Representatives*, Chapter XLVII.

<sup>6</sup> See especially the views of the minority in House Report, 147, 46th Cong., 3d Sess. Also, Hinds, § 1500.

<sup>7</sup> 220 U. S. 107; 31 Sup. Ct. Rep. 342. The court, however, add: "In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate, and approved by the President, and duly deposited with the State Department." Citing: *Field v. Clark*, 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294; *Harwood v. Wentworth*, 162 U. S. 547; 16 Sup. Ct. Rep. 890; 40 L. ed. 1069; *Bank v. Nebeker*, 167 U. S. 196; 17 Sup. Ct. Rep. 766; 42 L. ed. 134,

The Federal Executive has never attempted the exercise of, or claimed, the right to veto parts of measures submitted to him by Congress, and to approve the remainder. Because thus bound to accept or reject a bill as a whole, Congress has at times attempted to force the hand of the President by incorporating into a measure which it is known he will feel almost obligated to sign provisions which it is believed he would disapprove if submitted to him as independent propositions. At times, however, these so-called "riders" have led to the veto of the entire bill.<sup>8</sup>

It cannot be said to be definitely established, but the better view would seem to be that the President may not sign a bill after the adjournment of Congress.<sup>9</sup> It has been declared, however, that he may sign during a recess of that body.<sup>10</sup>

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<sup>8</sup> For a full discussion of the distinctions between acts, and joint and concurrent resolutions, see a report of the Senate Judiciary Committee, Sen. Rpt., Vol. 1335, 54th Cong., 2d Sess. Joint resolutions, being in general legislative in character, require the President's signature.

<sup>9</sup> Willoughby, *United States Constitutional Law*, § 257.

<sup>10</sup> *La Abra Silver Mining Co. v. United States*, 175 U. S. 423; 20 Sup. Ct. Rep. 168; 44 L. ed. 223.

## CHAPTER XXX

### THE GENERAL POWERS OF CONGRESS

#### **General powers**

In the chapters which are immediately to follow will be taken up seriatim the legislative powers of Congress except in so far as these powers have been considered incidentally elsewhere in this treatise.

In addition to their legislative powers the Houses of Congress have certain other powers, judicial or executive in character, such as, for example, with reference to impeachments, to punishing their members for disorderly conduct, or their expulsion if necessary, the determination of contested elections, etc. Each House of Congress has also, it has been held, the power to obtain the information necessary for an intelligent exercise of its lawmaking power, and for this purpose to summon witnesses, and compel the production of documents, and to punish as contempt disobedience to orders thus given. These non-legislative duties are discussed elsewhere in this treatise, and especially in the chapters dealing with the Separation of Powers.

In some cases the powers granted by the Constitution are also made obligations, and, in general, it may be said that where legislation is necessary to make effective the provisions of the Constitution there is laid upon Congress the constitutional obligation to enact this legislation. At the same time it must be said that this obligation is an "imperfect" one in that no legal means exist for compelling its performance or providing for what shall be done in the

event of its non-performance. Thus the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Should Congress fail by legislation to establish these inferior judicial tribunals and to clothe them with jurisdiction, there would be no constitutional means of compelling it to do so. Indeed, by failing as well to provide for the appointment and remuneration of Justices of the Supreme Court, Congress might render impossible the exercise of any Federal judicial power whatever. Once established the Supreme Court, by the immediate effect of constitutional provision, has the original jurisdiction provided for in § 2 of Article I, but it is unable to exercise any appellate jurisdiction by way of appeals from either the State or lower Federal courts except as Congress has by statute provided.

This is but a single illustration of many that might be given of the manner in which the existence and administration of the Federal Government is absolutely dependent upon the action of Congress. For it may be laid down as a principle which admits of no exceptions that no legal means exist for compelling a legislative body to enact a given piece of legislation, or, indeed, to perform any of its functions.<sup>1</sup>

Though, in many respects, not self-executing, and the obligations created by its provisions not enforceable by legal process, the Federal Constitution is, it is to be repeated, in all other respects a law and directly enforceable

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<sup>1</sup> The assertion has been made that should Congress fail to call a convention for the amendment of the Constitution a request to that effect having been made by two-thirds of the States, a mandamus might be issued to compel it to do so, the function of Congress in the premises being a purely ministerial one. The better view would, however, seem to be that the writ would not be issued.

as such in the courts of the land. It is, as has been already said, a law legislatively enacted by the State legislatures or the State conventions which, *quoad hoc* acting as a national law-making body, established it and ratified the amendments to it.

## CHAPTER XXXI

### FEDERAL POWERS OF TAXATION

#### Taxes defined

Taxes have been defined by an eminent authority to be "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."<sup>1</sup> The same author in another work observes that they "differ from forced contributions, loans, and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government."<sup>2</sup>

The power to tax is ordinarily spoken of as an incident of sovereignty, or, as a sovereign power. A more exact statement is, however, that inasmuch as the raising of a certain amount of revenue is essential to the existence and operation of a public governing body, that body has, even in default of express constitutional grant, an implied power to compel those subject to its authority to contribute the financial means necessary to its support.

The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner, is a legislative function.

The determination of the precise amount of the tax which each individual or piece of property shall pay according to the general rule legislatively laid down, is an ad-

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<sup>1</sup> Cooley, *Constitutional Limitations*, 7th ed., 678.

<sup>2</sup> *Taxation*, Chapter I.

ministrative act.<sup>3</sup> The determination whether the legislative rule is, constitutionally speaking, a proper one, and whether the administrative officials have followed it, as well as whether they have observed all the other requirements of law, is, of course, a judicial function. Thus the administrative official must in all cases in his assessments both as to classes of persons and kinds of property, and as to rates of taxation, be guided by the law. Upon the other hand, the legislature, when levying *ad valorem* taxes, has not the power itself, generally speaking, to declare the value of a specific piece or specific pieces of property for taxation purposes. Where, however, taxes are laid not according to values of property, but upon persons, as a capitation tax, or upon occupations, as license fees and tolls, or upon documents, as stamp duties, or upon number or quantities of goods ("specific" taxes), the legislature fixes in each case the amount of the contribution.

### **Taxation and eminent domain**

The levying and collection of taxes amounts, of course, to the taking of private property for a public use, but the taxing power is distinct from that of eminent domain. When property is taken in exercise of the latter power the Fifth Amendment requires that the Federal Government shall make just compensation. When, however, property is taken under the taxing power the persons so taxed are held compensated by the special or general benefits received from the existence and operations of the government.

### **The extent of the taxing power**

The power to tax is, from its very nature, one of the most important powers possessed by the State. Aside

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<sup>3</sup> *Meriwether v. Garrett*, 102 U. S. 472; 26 L. ed. 197.

from express constitutional limitations, the power places every person, every occupation, and all forms of property subject to such pecuniary burdens as the legislature may see fit to impose, the manner of apportioning and enforcing the collections of the contributions levied being within the discretion of the law-making body which imposes them.

A classic statement of the extent of the taxing power is that of Marshall in *McCulloch v. Maryland*.<sup>4</sup> Marshall says: "The power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard themselves against its abuse." "The power to tax," Marshall concludes, "involves the power to destroy."

#### **The use of the taxing power, not for revenue but for regulation**

By definition and by primary purpose a tax is a means whereby a public governing power seeks to secure a revenue. It has been generally held, however, that a tax may be levied avowedly and exclusively not for revenue but as a means for regulating a matter, which is within the legisla-

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<sup>4</sup> 4 Wh. 316; 4 L. ed. 579.



ture's power to control. Thus in *Veazie Bank v. Fenno*<sup>5</sup> the power of Congress to levy a tax as a means of regulating the currency was upheld. So, also, in *Edye v. Robertson* (Head Money Cases)<sup>6</sup> a law imposing a tax upon owners of vessels bringing immigrants to this country was held to be a regulation of commerce rather than a revenue measure.

In these cases it is seen that the view taken is that though the laws levy a contribution to the State and thus result in a revenue to the State, they are not, correctly speaking, tax laws at all. Not being, in fact tax laws, they are not subject to the constitutional limitations upon revenue measures as regards uniformity, apportionment, etc.

A proposition different from the one just discussed, is that a legislature, by a law framed as a tax measure, may, in effect, subject to regulation or even to destruction an enterprise over which it has no direct power or control. This point was squarely raised, with reference to the power of the Federal Government in the comparatively recent case of *McCray v. United States*,<sup>7</sup> decided in 1904.

In this case was questioned the constitutionality of a law of Congress levying a tax of ten cents a pound upon oleomargarine, artificially colored to look like butter. The contention was that this rate was so high as to be surely prohibitive of the manufacture and sale of such oleomargarine, and that, therefore, it was to be presumed that the motive of those enacting the law was not that a

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<sup>5</sup> 8 Wall. 533; 19 L. ed. 482.

<sup>6</sup> 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798.

<sup>7</sup> 195 U. S. 27; 24 Sup. Ct. Rep. 769; 49 L. ed. 78. See a valuable article in *Michigan Law Review*, VI, 277, entitled "May Congress Levy Money Exactions Designated Taxes, Solely for the Purpose of Destruction?"

revenue should be secured for the Federal Government, but that the manufacture should be prevented; and this, it was argued, rendered the law an unconstitutional effort upon the part of Congress to regulate the manufacture of a commodity within the States. The Supreme Court, however, held that the law being upon its face a revenue measure, its ultimate effect or the motive of its enactors might not be judicially inquired into. The scope and effect of a law may be inquired into, the court say, to determine whether the act is, in general character, within the legislative power of Congress, but, that determined in the affirmative, the measure may not be invalidated because of consequences that may arise from its enforcement.

The *McCray* case is, it will be seen, in one respect the opposite of *Veazie v. Fenno* and the *Head Money Cases*, in that it holds the law in question to be a tax law and constitutional because it is such; whereas, in the earlier cases, the laws were justified as being, in real character, not revenue measures at all, and, therefore, not subject to the limitations constitutionally imposed upon Congress when enacting revenue laws.

### Federal powers of taxation

By § 8 of Article I of the Constitution, Congress is given the general power "to lay and collect taxes, duties, imposts and excises."<sup>8</sup>

Duty and impost have a broad signification which makes them practically synonymous with the general term tax; more generally, however, they are given a narrower meaning according to which they become equivalent to customs

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<sup>8</sup> The clause continues: "to pay the debts and provide for the common defense and general welfare of the United States." This is not a grant of power. Cf. Story, *Commentaries*, §§ 902-926. See, also, *The License Tax Cases*, 5 Wall. 462; 18 L. ed. 497; *Knowlton v. Moore*, 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

or customs dues, that is, to taxes levied upon goods imported from foreign countries.

An excise is an inland tax upon manufacture or retail sale of commodities. It is thus often termed a consumption tax. In the United States the excise taxes are more generally known as internal revenue duties.<sup>9</sup>

The general power to levy taxes being given, the Constitution enumerates duties, imposts and excises as the classes of taxes which are to be levied uniformly throughout the United States.

### **Limitations upon the Federal taxing power**

The power of taxation given to the Federal Government is comprehensive and complete, embracing all possible subjects and modes of taxation except in so far as the Constitution, in other clauses, expressly limits the power, or except in so far as limitations may be implied from the general character of the American constitutional system. The express limitations are: (1) That "all duties, imposts and excises shall be uniform throughout the United States;" (2) that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken;" and (3) that "no tax or duty shall be laid on articles exported from any State."<sup>10</sup>

The implied limitations upon the Federal taxing power are those that relate to the general, if not absolute, exemption of State governmental agencies from Federal interference, whether by way of taxation or otherwise, and those arising out of all the express limitations upon the Federal Government, which, of course, are as operative when the Federal Government is exercising its taxing

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<sup>9</sup> For a general discussion of the various definitions of excise, duty and imposts, see *Pacific Ins. Co. v. Soule*, 7 Wall. 433; 19 L. ed. 95.

<sup>10</sup> Art. I, § 8, cl. 1; Art. I, § 7, cl. 4; Art. I, § 8, cl. 5.

power, as it is when employing any of the other rights possessed by it. Thus, for example, the United States may not, under the guise of a tax, take property without due process of law.

### **Due process of law and taxation**

We have already seen that the taking of private property by the State in exercise of the taxing power is not brought within the constitutional requirement, applicable in the case of property taken under the power of eminent domain, that direct pecuniary compensation therefor shall be made. In like manner the taking of private property in the form of taxes, is not, in itself, a taking of property without due process of law.<sup>11</sup>

Though the taking of the property in the form of a tax is thus not in itself a taking without due process, it may become such by reason of the purpose for which, or the manner in which, the tax is levied, assessed and collected.

Due process of law obliges the United States as well as the individual States, in the exercise of their taxing powers, to conform to the following rules:

1. That the tax shall be for a public purpose.
2. That it shall operate uniformly upon those subject to it.
3. That either the person or the property taxed shall be within the jurisdiction of the government levying the tax.
4. That, in the assessment and collection of the tax, certain guarantees against injustice to individuals, especially by way of notice and opportunity for a hearing, shall be provided.

### **Taxation must be for a public purpose**

A tax being in the eye of the law an enforced contribu-

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<sup>11</sup> Davidson v. New Orleans, 96 U. S. 97; 24 L. ed. 616.

tion from persons or property to raise money for a public purpose, it follows that where this public purpose is absent, the contribution sought to be enforced cannot be justified as a tax but amounts to an attempt to take property without due process of law. The validity of this proposition is beyond dispute, but judicial records furnish comparatively few instances of tax levies being held void for this reason. This is due, in the first place, to the fact that not often do the laws expressly state the purpose for which the tax is levied; and, in the second place, where this purpose is stated, the courts will, in deference to the legislative judgment, construe the purpose to be a public one if it is possible to do so.

A leading Federal case with reference to this subject is that of *Loan Association v. Topeka*.<sup>12</sup>

### **Power of Congress to appropriate money**

A parity of reasoning would seem to provide the principle that inasmuch as taxes must be for a public purpose, an appropriation of the proceeds of taxes should be for a public purpose. Furthermore, it would seem to be not unreasonable to argue that the Federal Government being one of limited enumerated powers, Congress has not the authority to appropriate money except for the performance of the duties thus constitutionally laid upon it. In fact, however, the limitation that an appropriation should be for a public purpose has been without practical effect, as the courts have in no case attempted to hold invalid an appropriation by Congress on the ground that it has been for a purpose not public in character; and, as regards the restriction that appropriations shall be in aid of enterprises which the Federal Government is empowered to undertake, the doctrine has become an established one

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<sup>12</sup> 20 Wall. 655; 22 L. ed. 455.

that Congress may appropriate money in aid of matters which the Federal Government is not constitutionally able itself to administer and regulate.<sup>13</sup>

The extent of the appropriating power of Congress is illustrated in the case of *United States v. Realty Co.*,<sup>14</sup> in which was upheld the power of Congress to appropriate money for the payment of certain claims which the Federal Government was not legally but only morally obligated to satisfy.

### **Equality in taxation**

The Fourteenth Amendment requires upon the part of the States that they shall not deny to any persons within their several jurisdictions the equal protection of the laws, and this obligation is, of course, operative in the field of taxation. No similarly phrased obligation is laid upon the Federal Government, but the provision of the Fifth Amendment forbidding the taking of property without due process of law imposes an obligation broad enough to cover all or nearly all cases of unequal protection of the laws. And, furthermore, as to taxes it is specifically provided that they shall be uniform throughout the United States.<sup>15</sup>

Whether or not the equal protection of the laws is included within the general prohibition against the taking of life, liberty or property without due process of law, the provision for equal protection does certainly mark off a specific right or a group of rights within the general field

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<sup>13</sup> See the paper by President Monroe, "Views of the President of the United States on the Subject of Internal Improvements" submitted in 1822 in connection with his veto of the Cumberland Road Bill.

<sup>14</sup> 163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215.

<sup>15</sup> The *Insular Cases* held that this clause has no application to unincorporated territories.

of rights against the violation of which by the State he is guaranteed by the Constitution. That this protection applies within the field of taxation is well established.<sup>16</sup>

As has been already noted, the determination as to when a tax shall be levied and upon what persons and property, and by what rule it is to be assessed and by what means collected is a legislative function. However, in levying an *ad valorem* tax the legislature may not determine the assessment value of particular pieces of property. So also it follows that while the legislature may, within its discretion, determine freely what occupations, or classes of property or persons are to be taxed, it may not select out from the general mass of property, or general citizen body, particular pieces of property or particular individuals to bear the burden of the tax. When, therefore, a tax is laid upon certain classes of property or of persons, there must be some reasonable basis for the classification adopted. By this is meant that there must be some substantial reason why the units, whether of property or of individuals, should be treated as distinct groups.<sup>17</sup>

### Uniformity of taxation

Granting the right of the legislature to classify persons and property for purposes of taxation, the requirements of due process of law and of the additional provision found in the Federal Constitution and in almost all if not in all of the State Constitutions that all laws shall be uniform, make it necessary that the assessments of all persons and property within the class or district selected for taxation shall be according to a uniform rule.<sup>18</sup>

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<sup>16</sup> *Santa Clara v. S. Pacific R. R. Co.*, 18 Fed. Rep. 385.

<sup>17</sup> See especially the language of the court in *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232; 10 Sup. Ct. Rep. 533; 33 L. ed. 892. Also, *Am. Sugar Refining Co. v. Louisiana*, 179 U. S. 89; 21 Sup. Ct. Rep. 43; 45 L. ed. 102.

<sup>18</sup> Cf. Cooley, *Constitutional Limitations*, 7th ed., 711, 724.

**What constitutes uniformity throughout the United States?**

In the *Head Money Cases*,<sup>19</sup> speaking with reference to the requirement of the Federal Constitution that all duties, imposts and excises shall be uniform throughout the United States, the court say: "The tax is uniform when it operates with the same force and effect in every place where the subject is to be found."

The principles of uniformity and of reasonable classification for purposes of taxation may be illustrated by cases passing upon the constitutionality of inheritance taxes. These taxes, collected from persons receiving property by inheritance, are levied in many of the civilized States of the world. In the United States they have several times been imposed by Federal law, and at present (1910) they are to be found in about thirty-five States. In many cases these taxes have been progressive, the rate being higher for larger than for smaller bequests, and collateral heirs often taxed more heavily than direct descendants. In most cases small inheritances have been wholly exempted from the operation of the tax, as have been also bequests and inheritances of real estate. In some cases State inheritance tax laws have been questioned because containing some special obnoxious provisions, but the ground upon which they have usually been attacked has been that they have violated the requirements of equality and uniformity, because of their progressive features and because of the exemptions referred to above. In general, however, the laws have been upheld.

In many cases the classifications in the State laws have been upheld as reasonable in themselves, but fundamentally the principle upon which the validity of the laws has been sustained is that an inheritance tax is not a tax upon the property inherited but upon the right to inherit; and

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<sup>19</sup> 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798.



that, inasmuch as this is a right which exists only by statute, it is one that may be regulated at the will of the legislature that creates it.

A leading case in the Federal courts as to the constitutionality of a State inheritance tax law as tested by the requirements of the Fourteenth Amendment, is that of *Magoun v. Illinois Trust & Savings Bank*.<sup>20</sup>

In this case the doctrine was reaffirmed that an inheritance tax is not one on property but on the right to take property by devise or descent, and that this right, being a legislative creation, the States may attach conditions thereunto. Hence, it was held, that the States may, in taxing this privilege, discriminate between relatives and between relatives and strangers without violating State constitutional provisions requiring uniformity and equality of taxation, or the provision of the Fourteenth Amendment prohibiting the denial of the equal protection of the laws. The provision of the Fourteenth Amendment, the court say, does not require "exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

The constitutionality of the inheritance tax provisions of the Federal law of 1898 was upheld in *Knowlton v. Moore*.<sup>21</sup>

### Protective tariffs

The constitutionality of a protective tariff, that is, a system of customs duties levied on foreign imports so ar-

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<sup>20</sup> 170 U. S. 283; 18 Sup. Ct. Rep. 594; 42 L. ed. 1037. See, also, *Billings v. Illinois*, 188 U. S. 97; 23 Sup. Ct. Rep. 272; 47 L. ed. 400, and *Campbell v. California*, 200 U. S. 87; 26 Sup. Ct. Rep. 182; 50 L. ed. 382. Cf. *Judson, On Taxation*, §§ 454, 455.

<sup>21</sup> 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969. See, also, *Snyder v. Bettman*, 190 U. S. 249; 23 Sup. Ct. Rep. 803; 47 L. ed. 1035.

ranged as to furnish incidental protection to home industries, though questioned in earlier years, has now passed beyond the range of controversy. Such laws being on their faces revenue measures, they may not be questioned because their effect is primarily to supply protection rather than revenue and because this was the intent of the enacting legislature. The doctrine of the court in *McCray v. United States*<sup>22</sup> is conclusive as to this. But even if this were not so, a tariff avowedly levied primarily and solely for protection is constitutionally justified under the grant of authority to Congress "to regulate commerce with foreign nations."

### Bounties

The constitutionality of bounties has never been squarely passed upon by the Supreme Court. Their validity was questioned in *Field v. Clark*<sup>23</sup> and *United States v. Realty Co.*,<sup>24</sup> but in neither case did the court find itself obliged to decide the point. The ground upon which the constitutionality of bounties has been contested has been that their payment amounts to an appropriation of public moneys primarily for a private purpose. The courts have often held that an expenditure in the public interest is not invalidated by the fact that incidentally private interests are advanced thereby; but in general they have held that an appropriation primarily and directly for the furtherance of private interests is not validated by the fact that incidentally public interests are in a measure promoted.<sup>25</sup>

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<sup>22</sup> 195 U. S. 27; 24 Sup. Ct. Rep. 769; 49 L. ed. 78. For a summary of arguments *pro* and *contra* as to the constitutionality of protective tariffs, see Stanwood, *Tariff Controversies in the United States*.

<sup>23</sup> 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

<sup>24</sup> 163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215.

<sup>25</sup> For a definition of bounties see *Downs v. United States*, 187

## Export duties

Among the express limitations upon the powers of Congress, enumerated by the Constitution, is that which provides that "no tax or duty shall be laid on articles exported from any State."<sup>26</sup> In another clause substantially the same prohibition is laid upon the States, it being declared that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports."<sup>27</sup>

The term "exports" has been judicially limited to goods exported to foreign countries. In the earlier cases of *Brown v. Maryland*<sup>28</sup> and *Almy v. California*<sup>29</sup> it was taken for granted by the courts that the term applied also to goods carried from one State to another State of the Union, but in *Woodruff v. Parham*<sup>30</sup> these *dicta* were overruled and the position taken which has not since been disturbed, that the prohibition has reference only to exportations to countries foreign to the United States.<sup>31</sup>

To come within the definition of an export tax, it has been held that the tax must be one levied upon the right to export, or upon goods because of the fact that they are being exported or are intended to be exported. The fact that certain goods are intended for export does not, however, exempt them from an ordinary property tax, for, as said, the tax is one on exports only when its incidence or amount is determined by the fact that the goods are intended for export. This is the doctrine laid down in

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U. S. 496; 23 Sup. Ct. Rep. 222; 47 L. ed. 275. See also article, "The Sugar Bounties" in *Harvard Law Review*, V, 320.

<sup>26</sup> Art. I, § 9, cl. 5.

<sup>27</sup> Art. I, § 10, cl. 2.

<sup>28</sup> 12 Wh. 419; 6 L. ed. 678.

<sup>29</sup> 24 How. 169; 16 L. ed. 644.

<sup>30</sup> 8 Wall. 123, 19 L. ed. 382.

<sup>31</sup> See, also, *Dooley v. United States*, 183 U. S. 151; 22 Sup. Ct. Rep. 62; 43 L. ed. 128, for a discussion as to what constitutes an export tax.

Coe *v.* Errol <sup>32</sup> with reference to taxation by the States and in Turpin *v.* Burgess <sup>33</sup> with reference to Federal taxation.<sup>34</sup>

### Direct taxes

The Constitution provides that capitation and other direct taxes levied by Congress shall be apportioned among the States in proportion to their respective populations. In a number of instances the constitutionality of Federal taxes not thus apportioned has been questioned upon the ground that they were, within the constitutional meaning of the word, direct taxes. The decision of the Supreme Court in each of these cases in which this point has been raised has supplied an authoritative determination only as to the direct or indirect character of the particular taxes in question.

In 1798 in *Hylton v. United States* <sup>35</sup> it was held that a tax on carriages was not a direct tax.

In *Pacific Insurance Co. v. Soule* <sup>36</sup> a tax on receipts of insurance companies was held to be not a direct tax, the *dicta* in *Hylton v. United States* being relied upon as authority.

In *Veazie Bank v. Fenno* <sup>37</sup> a tax on the circulating notes of State banks was held to be an indirect tax.

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<sup>32</sup> 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

<sup>33</sup> 117 U. S. 504; 6 Sup. Ct. Rep. 835; 29 L. ed. 988.

<sup>34</sup> In *Pace v. Burgess*, 92 U. S. 372; 23 L. ed. 657, it was held that the Federal requirement that stamps be affixed to packages of manufactured tobacco intended for exportation was a measure for the prevention of fraud, and not an export tax. In *Fairbanks v. United States*, 181 U. S. 283; 21 Sup. Ct. Rep. 648; 45 L. ed. 862, it was held that a stamp tax on foreign bills of lading, imposed by the act of 1898 was, in effect, a tax on the articles exported and, as such, an export tax and void. *Cf.* *Cornell v. Coyne*, 192 U. S. 418; 24 Sup. Ct. Rep. 383; 48 L. ed. 504.

<sup>35</sup> 3 Dall. 171, 1 L. ed. 556.

<sup>36</sup> 7 Wall. 433; 19 L. ed. 95.

<sup>37</sup> 8 Wall. 533; 19 L. ed. 482.

In *Scholey v. Rew*<sup>38</sup> a tax on succession to real estate was held indirect, the tax being declared to be one not upon the land, but upon the right of succession.

In *Springer v. United States*<sup>39</sup> the income taxes provided for by the law of 1862 were held not to be direct taxes. After reviewing earlier cases and citing the opinions of leading commentators, the court conclude: "Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

#### **Income Tax case—*Pollock v. Farmers' L. & T. Co.***

The foregoing line of cases, concluding with the emphatic assertion of a unanimous court in *Springer v. United States*, justly gave rise to the general opinion that the only taxes to be deemed direct taxes within the constitutional meaning of the term were capitation taxes and taxes on real estate. However, in the so-called Income Tax Case—*Pollock v. Farmers' Loan & Trust Co.*<sup>40</sup>—decided in 1895, this doctrine was overthrown, the court, upon the first hearing holding that taxes on the rents or income of real estate are direct taxes; and, upon a rehearing, holding that taxes on personal property or on the income derived from personal property are also direct.

Upon the first hearing the crucial point was, of course, whether a tax upon the income derived from real estate was distinguishable from a tax on the real estate itself. This being decided in the negative, it necessarily followed that, inasmuch as a tax on the real estate is admittedly a direct tax, a tax on the income derived therefrom would be direct.

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<sup>38</sup> 23 Wall. 331; 23 L. ed. 99.

<sup>39</sup> 102 U. S. 586; 26 L. ed. 253.

<sup>40</sup> 157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759, and 158 U. S. 601; 15 Sup. Ct. Rep. 912; 39 L. ed. 1108.

A rehearing of the case having been allowed the court broadened still further the scope of the term "direct taxes," making it include taxes on personal property and upon the income therefrom. From this doctrine four justices dissented.

In *Nicol v. Ames* <sup>41</sup> the scope of the doctrine laid down in the Income Tax Case was clearly stated. In this case it was argued that a duty levied by the War Revenue Act of 1898 upon sales or agreements of sale of products or merchandise at exchanges or boards of trade was a direct tax and as such unconstitutional because not properly apportioned. The court, however, held that the tax was in the nature of a duty or excise tax for the privilege of doing business at such places and not a tax on the products or merchandise sold, and, therefore, not a direct tax.

In *Patton v. Brady* <sup>42</sup> a tax upon tobacco, however prepared, manufactured and sold, for consumption or sale, was held not a direct tax but an excise tax,—“not a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use.”

In *Spreckles Sugar Refining Co. v. McClain* <sup>43</sup> the special excise tax imposed on sugar refining by the act of 1898, and measured by the gross annual receipts in excess of a named sum, was held to be not a direct tax. “Clearly,” the court say, “the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts.”

The constitutional definition of a direct tax was again

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<sup>41</sup> 173 U. S. 509; 19 Sup. Ct. Rep. 522; 43 L. ed. 786.

<sup>42</sup> 184 U. S. 608; 22 Sup. Ct. Rep. 493; 46 L. ed. 713.

<sup>43</sup> 192 U. S. 397; 24 Sup. Ct. Rep. 376; 48 L. ed. 496.

raised in *Knowlton v. Moore*<sup>44</sup> with reference to the constitutionality of the inheritance taxes levied by the War Revenue Act of 1898. The court applied the well established doctrine that the taxes in question were not upon the property inherited but upon the right to inherit, and, therefore, not being taxes upon property but upon a right, were in the nature of an excise tax, and as such indirect.

### **The Federal Corporation Tax of 1909**

By § 38 of the Tariff Law of 1909 provision is made "that every corporation, joint-stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint-stock companies or associations, or insurance companies subject to the tax hereby imposed, or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of

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<sup>44</sup> 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint-stock companies or associations, or insurance companies subject to the tax hereby imposed." In *Flint v. Stone Tracy Co.*,<sup>45</sup> the court unanimously held this tax to be an excise levied "upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described." As such it was held to be an indirect tax which did not need to be apportioned among the States according to their respective populations. The income of the concerns taxed was declared to be but the measure of the tax and not the subject-matter itself of the tax.

### Due process of law and taxation

Due process of law requires that in the case of an *ad valorem* tax an opportunity shall be given the taxpayer to appear and give evidence as to the proper valuation of the property which is assessed.<sup>46</sup> In other cases, however, no notice or opportunity for hearing need be given the taxpayer.<sup>47</sup>

It is not necessary that the hearing thus required in the case of *ad valorem* taxes should be before a court of justice. The hearing may be had and, in fact, is usually had, before an administrative board whose action in this respect is judicial in character and whose determinations may be final and conclusive in the matter. Thus, for example, in § 2930 of the Revised Statutes, it is provided that in the matter of appraisement of imports an appeal shall be allowed the importer from the collector of customs to "one

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<sup>45</sup> 220 U. S. 107; 31 Sup. Ct. Rep. 342.

<sup>46</sup> Or, if it be a special assessment for the purpose of some public improvement, as to whether the property in question is properly included within the assessment.

<sup>47</sup> *Hagar v. Reclamation District*, 111 U. S. 701; 4 Sup. Ct. Rep. 663; 28 L. ed. 569.



discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants," but that "if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be true value, and the duties shall be levied thereon accordingly." Provision is, however, made for relief in cases where the collectors have acted fraudulently or upon a principle not sanctioned by law, or where they have in any way transcended the powers given them by Congress.

In *Hilton v. Merritt*<sup>48</sup> the constitutionality of these provisions was upheld. In *Auffmordt v. Hedden*<sup>49</sup> it was held that it was not necessary, and that it had not been the intention of Congress that the hearing before the appraisers or collector should be characterized by all the formalities of a court of law, but that the proceedings might, and from necessity would generally have to, be of a summary character. The court thus held that due process of law had not been denied because the importer or his agent had been practically excluded from the hearing upon the reappraisement, that he had not been permitted to confront the opposing witnesses by testimony on his own behalf or been allowed the aid of counsel. "No government," said the court, "could collect the revenues, or perform its necessary functions, if the system contended for by the plaintiffs were to prevail."

For the collection of taxes, as well as for the appraisement for taxation, summary modes of procedure may be had, the justification being that without such means no government can maintain itself.<sup>50</sup>

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<sup>48</sup> 110 U. S. 97; 3 Sup. Ct. Rep. 548; 28 L. ed. 83.

<sup>49</sup> 137 U. S. 310; 11 Sup. Ct. Rep. 103; 34 L. ed. 674.

<sup>50</sup> See especially *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272; 15 L. ed. 372.

Due process of law in matters of taxation does not require the same kind of notice that is required in a suit at law, or in proceedings for taking private property under the power of eminent domain. No violation of due process of law is committed when a tax is collected according to customary forms and established usages, or in subordination to the principles which underlie them. "This must be so," the court say in *King v. Mullins*,<sup>51</sup> "else the existence of government might be put in peril by the delays attendant upon formal judicial proceedings for the collection of taxes."

In most of the States it is provided by statute that the assessment and collection of taxes shall not be restrained by a judicial writ; and, since 1867, by act of Congress, it has been provided that "no suit for the purpose of restraining the assessment or collection of taxes shall be maintained in any court."<sup>52</sup>

The constitutionality of this provision has been sustained whenever questioned, administrative necessity furnishing the justification.<sup>53</sup>

### **Borrowing power of the United States: legal tender**

The Federal Government is given power "to borrow money on the credit of the United States."<sup>54</sup>

The power thus given is free from limitations. In the draft of the Constitution reported by the Committee on Detail to the Constitutional Convention, the draft read, "To borrow money and emit bills on the credit of the United States." The express authorization to emit bills of credit was stricken out by the Convention, but, ap-

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<sup>51</sup> 171 U. S. 404; 18 Sup. Ct. Rep. 925; 43 L. ed. 214.

<sup>52</sup> Rev. Stat., § 3224.

<sup>53</sup> *Cheatham v. United States*, 92 U. S. 85; 23 L. ed. 561; *Railroad Tax Cases*, 92 U. S. 575; 23 L. ed. 663.

<sup>54</sup> Art. I, § 8, cl. 2.

parently, not with the intention of thereby depriving the United States of the power, but upon the ground that the power would be included in the general authority to borrow money. That this is so, has not been questioned by the courts. There has, however, been serious controversy as to the power of the United States to give a legal tender character to these bills when issued.

The debates in the Constitutional Convention, and various provisions of the Constitution, would seem to indicate an intention upon the part of the framers of the Constitution that a legal tender character might be given by Congress only to the metallic money coined by the United States, and the Supreme Court in *Hepburn v. Griswold*<sup>55</sup> so held as regards the payment of debts between private parties created before the enactment of the law. In *Knox v. Lee*,<sup>56</sup> however, four justices dissenting, this doctrine was overthrown, and the issuance of legal tender notes authorized as a legitimate war power. And finally, in the Legal Tender Cases, *Juillard v. Greenman*,<sup>57</sup> the authority in question was conceded to exist as implied in the general power to borrow money, whether in times of war or peace.

As regards the contention that the effect of applying the legal tender law to prior contracted debts is to deprive the creditor of property without due process of law, in violation of the Fifth Amendment, the court in *Knox v. Lee* say: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that directly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses,

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<sup>55</sup> 8 Wall. 603; 19 L. ed. 513.

<sup>56</sup> 12 Wall. 457; 20 L. ed. 287.

<sup>57</sup> 110 U. S. 421; 4 Sup. Ct. Rep. 122, 28 L. ed. 204.

may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war declared."

## CHAPTER XXXII

### INTERSTATE AND FOREIGN COMMERCE

#### **The commerce clause: its importance**

In this chapter will be considered the respective powers of the Federal Government and of the States with reference to interstate commerce. The constitutional law governing this subject is very similar to, and its exposition will serve in a very large measure to explain, the law governing commerce with foreign nations, with the Indian Tribes, with or between the Territories, and with the District of Columbia. In so far as there are differences these will be stated in the special paragraphs devoted to these classes of commerce.

By Clause 3 of § 8 of Article I of the Constitution, known as the Commerce Clause, Congress is given power to "regulate commerce with foreign nations and among the several States, and with the Indian Tribes."

The full importance of the grant of authority contained in this clause did not appear for many years after the adoption of the Constitution. Not until 1824 by the decision of the Supreme Court in *Gibbons v. Ogden*<sup>1</sup> was a clear indication given of the extent of the power granted, and not until the Constitution was nearly a hundred years old did Congress begin the exercise of the authority granted it to regulate, affirmatively, commerce between the States.

#### **Commerce defined: transportation essential**

Commerce has frequently been defined by the courts as

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<sup>1</sup> 9 Wh. 1; 6 L. ed. 23.

intercourse. But not all intercourse is commerce. To render intercourse commerce there must be present the element of transportation, whether of persons or things. "Transportation is essential to commerce, or rather is commerce itself."<sup>2</sup>

The commodities transported may be tangible and ponderable, or intangible and imponderable, as, for example, telegraphic or telephonic messages.<sup>3</sup>

### **The instrumentalities of commerce**

"The powers . . . granted by [the commerce clause] are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as the new agencies are successively brought into use to meet the demands of increasing population and wealth."<sup>4</sup>

The doctrine thus laid down in the *Pensacola Case* has never been questioned. Telephonic messages are, of course, covered by it. No case involving the transmission of wireless messages has arisen, but without doubt they

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<sup>2</sup> *Railway Co. v. Husen*, 95 U. S. 465; 24 L. ed. 527. Whether or not the going of persons across State lines, whether on foot or in vehicle, is commerce, no element of trade or barter being involved, can be said to be interstate commerce is doubtful. This undoubtedly would be intercourse, the freedom of which might not be restrained by the States, but, to the author it would not be commerce. But see House Rpt. No. 2270, parts 1 and 2, 61st Cong., 3d Sess.

<sup>3</sup> *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; 24 L. ed. 708; *Leloup v. Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep. 1383; 32 L. ed. 311.

<sup>4</sup> *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; 24 L. ed. 708.

would be treated as commerce, and the same would be true of messages and persons carried by balloons and other apparatus for the navigation of the air.

### **Commerce embraces water navigation**

Commerce includes navigation of the water, and where this navigation is for the transportation of persons or goods to or from foreign countries or among the States, it is brought within the authority given to the Federal Government by the commerce clause. This was established once for all in *Gibbons v. Ogden*.<sup>5</sup>

### **Transportation of persons is commerce**

That the transportation of persons is commerce was at first denied by Justice Barbour in the opinion which he rendered in *New York v. Miln*,<sup>6</sup> but this doctrine was at once overruled and has not since been questioned.

### **Bills of exchange not articles of commerce**

In *Nathan v. Louisiana*<sup>7</sup> the court laid down the doctrine that the buying and selling of foreign bills of exchange, while an aid to, and an incident of, commerce, is not itself commerce. "The individual," say the court, "who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit . . . is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on." And also: "A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail."

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<sup>5</sup> 9 Wh. 1; 6 L. ed. 23.

<sup>6</sup> 11 Pet. 102; 9 L. ed. 648.

<sup>7</sup> 8 How. 73; 12 L. ed. 992.

**Insurance not commerce**

The writing, selling and transmission of insurance policies has been held not to be commerce.

That the business of fire insurance is not commerce was decided in *Paul v. Virginia*.<sup>8</sup>

That the business of marine insurance is not commerce was held in *Hooper v. California*.<sup>9</sup>

In *New York Life Insurance Co. v. Craven*<sup>10</sup> these cases are cited with approval and applied to life insurance, the court saying: "We repeat, the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea. And we add, or against the uncertainty of man's mortality."

In *Hopper v. California* the court emphasize the distinction between interstate commerce or an instrumentality thereof, and the mere incidents, of which insurance is one, which may attend the carrying on of such commerce. "This distinction," the court declare, "has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with the trade between the States; and would exclude State control over many contracts purely domestic in their nature."

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<sup>8</sup> 8 Wall. 168; 19 L. ed. 357.

<sup>9</sup> 155 U. S. 648; 15 Sup. Ct. Rep. 207; 39 L. ed. 297.

<sup>10</sup> 178 U. S. 389; 20 Sup. Ct. Rep. 962; 44 L. ed. 1116.



## Lotteries

By act of March 2, 1893, entitled "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," the carriage of lottery tickets from one State to another, whether by mail, or by freight or express was absolutely prohibited.<sup>11</sup>

After having been three times argued before the Supreme Court the Lottery Law was upheld in *Champion v. Ames*,<sup>12</sup> four justices dissenting.

## Bearing of the lottery decision on insurance

The holding by the court that lottery tickets are articles of commerce and may become articles of interstate commerce, has undoubtedly increased the possibility that, should a Federal law be enacted in regulation of insurance companies doing business in more than one State, it will be sustained by the Supreme Court. Certainly there are very great points of similarity between an insurance policy and a lottery ticket. Like the insurance policy, the lottery ticket is a promise to pay upon the happening of a certain contingency. Lottery tickets, to be sure, freely pass from hand to hand by sale or exchange, but, though not so readily, insurance policies are also at times sold and exchanged. Furthermore, should the constitutionality of a Federal law in regulation of insurance be involved, it would receive the benefit of every rational doubt.

## International Text Book Co. v. Pigg

The definition of interstate commerce is still further widened in the case of the *International Text Book Co.*

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<sup>11</sup> 28 Stat. at L. 963.

<sup>12</sup> 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

*v. Pigg*.<sup>13</sup> In that case it was held that the carrying on by a corporation of instruction of students in other States by correspondence, the solicitation of students in other States by local agents, and the collection and transmitting of fees to the home office, is a carrying on of interstate commerce.

### **Commerce does not include the production of the commodities transported**

In a series of most important decisions it has been held that commerce does not begin until the goods intended for purchase, sale or exchange in another State have begun their trip thither. That is to say, they must at least have been placed in the hands of the agents who are to transport them. The mere fact that goods are manufactured to be transported and sold in another or other States, or that they have been segregated in the places where produced, for that purpose, is not sufficient to make them articles of interstate commerce. In some way they must have advanced some distance upon their way outside of the State of production. It is clear, therefore, that the whole process of manufacture or production is definitely excluded from the operation of the commerce clause. "Commerce succeeds to manufacture, and is not a part of it."<sup>14</sup>

### **Intent to export not controlling**

The fact that goods are manufactured for export does not render their manufacture an element in the interstate or foreign commercial transaction. This principle is clearly laid down in *Coe v. Errol*.<sup>15</sup> In this case the court held that certain logs cut in New Hampshire and hauled

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<sup>13</sup> 217 U. S. 91; 30 Sup. Ct. Rep. 431; 54 L. ed. 678.

<sup>14</sup> *United States v. E. C. Knight Co.*, 156 U. S. 1; 15 Sup. Ct. Rep. 249; 39 L. ed. 325.

<sup>15</sup> 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

to a river town for transportation to the State of Maine but not yet actually started upon their final way to that State, had not become articles of interstate commerce. The court say: "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin, to that of their destination."

**Interstate commerce includes the sale of the articles imported**

It has been seen that interstate commerce does not begin until, by some definite act, the goods have started upon their trip outside the State of origin. As to the termination of interstate transportation it has been established that this does not occur until the goods transported have reached their destination, been delivered, and, either sold or taken out of their original packages in which shipped, and thus commingled with the other goods of the State.

The right to import, including the right of the importer to sell the goods imported, and the right to engage in interstate and foreign commerce being a Federal right, the States have no more constitutional power to restrain or regulate the sale of imported commodities by the importer than they have to prevent or regulate their being brought within the State.<sup>16</sup>

The fact that the right to engage in commerce carries with it the right to sell the goods transported, does not, it has been held, exclude the right of the State to tax goods

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<sup>16</sup> *Brown v. Maryland*, 12 Wh. 419; 6 L. ed. 678; *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. ed. 128. As to the inability of a State to prevent commodities from being taken out the State see *West v. Kansas Natural Gas Co.*, 221 U. S. 229; 31 Sup. Ct. Rep. 564; 55 L. ed. 716.

brought from another State still unsold, and still in their original packages, provided such goods be not discriminated against because of their having been brought into the State from another State. As to imports from foreign countries, however, the rule is that until sale in the original package, or until the breaking of the package, no State tax may be imposed. This prohibition is, however, not drawn from the commerce clause but from the express provision of the Constitution that "No State shall, without the consent of Congress, lay any impost or duty on imports or exports."<sup>17</sup>

### **The original package doctrine**

From the foregoing sections it has appeared that the State's authority over articles brought in from the other States does not attach, except for purposes of taxation, until the articles so brought in have been sold. It will also have appeared, however, from the quotations which have been made, that this rule is modified by the doctrine that, whether sold or not, the articles brought in lose their interstate commercial character, and full State authority at once attaches, as soon as these articles have in any way become mixed with the general mass of property of the State to which they have been transported. As a convenient test for determining when this commingling takes place, the Supreme Court early developed the so-called "Original Package" doctrine. This doctrine is that so long as the commodity is kept in the unbroken package in which it was delivered to the carrier for transportation, no commingling with the State goods has taken place. At times this has been stated by the courts and by commentators as an absolute rule. In fact, however, the doctrine does not state a right to which the exporter is entitled,

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<sup>17</sup> Art. I, § 10, cl. 1.

but is a test which the court frequently finds convenient to apply for determining when commingling of the imports with State goods has taken place, but which in other cases may be held inapplicable because of the character of the goods transported.<sup>18</sup>

### **Exclusiveness of Federal control over interstate commerce**

The Federal authority over interstate commerce is not in terms made exclusive, and the courts have at times varied their views as to the extent to which an exclusiveness is to be deemed implied. From the beginning the States acted upon the assumption that they were not deprived of power to grant to persons and corporations exclusive privileges with reference to the carrying on upon land of commerce between themselves and other States; and this practice was acquiesced in by the Federal Government. As to the carrying on of interstate commerce by water, however, it seems to have been more generally held that the Federal jurisdiction was exclusive. This, however, was not judicially determined until the decision of the great case of *Gibbons v. Ogden*.<sup>19</sup>

### **Gibbons v. Ogden**

In this case it was held that the grant by the State of New York to an individual of an exclusive right to navigate

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<sup>18</sup> The doctrine was first stated in *Brown v. Maryland*, 12 Wh. 419; 6 L. ed. 678, and reaffirmed in *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. ed. 128, with reference to the importation of intoxicating liquors; and in *Schollenberger v. Pennsylvania*, 171 U. S. 1; 18 Sup. Ct. Rep. 757; 43 L. ed. 49. For instances in which the court found it difficult to apply the doctrine see *May v. New Orleans*, 178 U. S. 496; 20 Sup. Ct. Rep. 976; 44 L. ed. 1165; *Austin v. Tennessee*, 179 U. S. 343; 21 Sup. Ct. Rep. 132; 45 L. ed. 224; *Cook v. Marshall*, 196 U. S. 261; 25 Sup. Ct. Rep. 233; 49 L. ed. 471.

<sup>19</sup> 9 Wh. 1; 6 L. ed. 23.

its waters with steam vessels had no constitutional validity in so far as interstate or foreign commerce was affected. In support of this judgment, Marshall, in his opinion, laid down in general terms the doctrine that by the commerce clause, the Federal Government is granted an exclusive control of commerce between the States, and with foreign countries, and that, therefore, it is beyond the constitutional power of the States to grant, or to withhold, interstate or foreign commercial privileges.

A review of the cases which followed *Gibbons v. Ogden* will show, however, that the doctrine of the Supreme Court as to the exclusiveness of Federal authority over commerce has not been a uniform one. Without abandoning the doctrine that the States are constitutionally disqualified from directly interfering with the regulation of commerce, the Supreme Court has at times upheld State acts which have in fact amounted to substantial interferences with interstate and foreign commerce. And indeed, the language of the court, and even of Marshall himself, in certain cases, has implied the adoption of the doctrine that the constitutionality of a State law in regulation of, or interfering with, the freedom of interstate and foreign commerce is to be tested rather by the existence of a conflicting Federal statute, than by the exclusiveness of the Federal jurisdiction.<sup>20</sup>

In *Cooley v. Port Wardens*,<sup>21</sup> decided in 1851, the Supreme Court, three justices dissenting, accepted the principle that had been suggested by Webster and approved by Justice Woodbury, and upheld a pilotage law of Pennsylvania on the ground that, though it was a regulation of

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<sup>20</sup> See *Brown v. Maryland*, 12 Wh. 419; 6 L. ed. 678; *Wilson v. Blackbird Creek Co.*, 2 Pet. 245; 7 L. ed. 412; *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648; *License Cases*, 5 How. 504; 12 L. ed. 256; *Passenger Cases*, 7 How. 283, 12 L. ed. 702.

<sup>21</sup> 12 How. 299; 13 L. ed. 996.

commerce, it was with reference to a matter properly lending itself to local State control, and one for the regulation of which Congress had not legislated. Justice Curtis, delivering the opinion of the court, said: "When the nature of a power like this [the commerce power] is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say that they are of such a nature as to require exclusive legislation by Congress."

The doctrine of *Cooley v. Port Wardens* is, at the present time, the accepted doctrine of the Supreme Court. In *Bowman v. R. R. Co.*<sup>22</sup> the doctrine is declared to be firmly established.

The rule thus stated as to the distinction between subjects requiring general and those necessitating, or at least rendering highly desirable, local regulation, is a simple and rational one. It is, however, one, which in application has not infrequently given rise to considerable difficulty, there being no definite *criteria* for distinguishing between these two classes of subjects. This has made it necessary that each case should be determined by itself, the Supreme Court in each instance deciding whether the State law in question is, or is not, regulative of a matter properly requiring national control.

Among the more important subjects which, it has been held, may, in the absence of Federal legislation, be controlled by the States, because they lend themselves to local regulation, are ferries, bridges, pilotage and harbor regulations.<sup>23</sup>

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<sup>22</sup> 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

<sup>23</sup> In *Covington Bridge Co. v. Kentucky*, 154 U. S. 204; 14 Sup. Ct. Rep. 1087; 38 L. ed. 962, the cases are reviewed and summarized.

### **The police powers of the States and commerce**

Very closely related to the authority of the States to legislate with reference to commercial matters of a local character, is the power of the States, in the exercise of their police powers to enact and enforce measures which incidentally, but often substantially, affect interstate commerce.

The distinction which is drawn between these police powers of the States, and their authority to enforce local commercial regulations is that, in the absence of counter-vailing Federal legislation, the latter are valid even though conceded to bear directly upon interstate or foreign commerce; whereas the police regulations are only valid when their influence upon interstate or foreign commerce is an incidental, indirect one. In other words, as to matters of local concern, the States are recognized to have a concurrent power in the fields of interstate and foreign commerce; while as to police measures (and the same is true as to tax laws or other State laws for the regulation of domestic commerce) the States have an authority which is not concurrent with that of the United States, but which is, when kept within its proper sphere, exclusive of Federal control. Thus, local regulations, even though they operate directly upon interstate and foreign commerce, are valid unless and until there is Federal legislation concerning the same subject. Tax laws, laws for the regulation of domestic commerce and police regulations, upon the other hand, have no constitutional validity whatever if they operate directly and primarily as a restraint upon interstate or foreign commerce as such.

To the writer it would seem that the foregoing distinction between the concurrent local legislative powers and the police powers of the States with reference to interstate and foreign commerce is an unnecessary and confusing one, for the fact is to be noted that all the local



regulations which have been referred to in the preceding section may properly be described as police regulations and justified as such. If, and when, so justified, it will be possible for the courts, without changing substantially the effect of its holdings, to accept finally and completely the doctrine of the exclusiveness of Federal authority over interstate and foreign commerce, and base the validity of local State commercial regulations not upon a State, concurrent legislative power as to local matters, but upon the States' police or other reserved powers. However, the courts still recognize the distinction between the two sources of State power to affect interstate commerce by their legislation, and this distinction is, therefore, here recognized.

That a State law which, in its essential nature, is a legitimate exercise of the police powers is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected is well established.<sup>24</sup>

This interference with interstate and foreign commerce, it is to be emphasized, is permitted only when the necessities and the convenience of the public seem to demand it and when the regulation provided for is a reasonable and just one. In other words, the States may not, under the guise of an exercise of their police powers, attempt what in effect amounts to a direct regulation of interstate and foreign commerce, or impose an unnecessary or arbitrary burden upon interstate carriers. As will later appear the same principle applies to the exercise of the other powers of the States, as for example, the power to tax, or to regulate domestic commerce. In the exercise of these powers it is often the case that interstate and foreign commerce

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<sup>24</sup> *Hennington v. Georgia*, 163 U. S. 299; 16 Sup. Ct. Rep. 1086; 41 L. ed. 166; *L. S. & M. S. Ry. Co. v. Ohio*, 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702; *Houston v. Mayes*, 201 U. S. 321; 26 Sup. Ct. Rep. 491; 50 L. ed. 772.

are indirectly and even substantially affected. But in no case may regulation of interstate and foreign commerce be the direct or primary aim of the State's action. If this is the aim or effect, no support for the validity of the law may be obtained by calling the law a police regulation.<sup>25</sup>

It is thus evident that the Federal court will examine a State police regulation not only with reference to the fact whether or not it amounts to a direct regulation of interstate commerce, but whether its provisions are in themselves sufficiently reasonable, practicable and just, as to furnish an excuse and justification for the incidental interference with interstate commerce which their enforcement will necessitate.

Finally, with reference to the police powers of the States and interstate commerce, it is to be observed that however incidental their effect upon interstate commerce they have, of course, no validity in so far as they conflict with existing Federal statutes. In *Houston v. Mayes*<sup>26</sup> the court say: "Of course such [police] rules are inoperative if conflicting with regulations upon the same subject enacted by Congress."

### **State regulation of interstate trains**

The general principles governing the exercise of police powers by the States in their relation to interstate commerce have been stated. It remains but to enumerate certain of the applications which, in specific instances, these doctrines have received.

A series of cases have been decided by the Supreme Court with reference to the validity of State laws seeking to control the manner of running and operating trains. When the provisions of these laws have been found reasonably necessary for the protection and convenience of the

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<sup>25</sup> *Henderson v. Mayor*, 92 U. S. 259; 23 L. ed. 543.

<sup>26</sup> 201 U. S. 321; 26 Sup. Ct. Rep. 491; 50 L. ed. 772.

people, and not discriminative against interstate trains, they have been upheld in their application to such interstate trains. Thus State laws have been sustained which have forbidden the running of freight trains on Sunday; forbidding heating cars by stoves; requiring trains to stop at county seats; and other populous centers; requiring locomotive engineers to be examined and licensed by the State authorities; requiring such engineers to be examined from time to time with respect to their ability to distinguish colors; requiring telegraph companies to receive dispatches and to transmit and to deliver them with due diligence, as applied to messages from outside the State; requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations; forbidding the consolidation of parallel or competing lines of railway; regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto; providing that no contract shall exempt any railroad corporations from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made; and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination; unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent.<sup>27</sup>

From the foregoing it will appear that some of the State police regulations which have been sustained in their

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<sup>27</sup> This summary is substantially taken from that given by the court in *Mo. Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612; 29 Sup. Ct. Rep. 214; 53 L. ed. 352.

application to interstate traffic have had for their aim not the health, morals and safety of the people of the States enacting them, but simple public convenience. In *Lake Shore, etc., Ry. Co. v. Ohio*,<sup>28</sup> in which prior decisions upon this point are carefully considered; the court say: "The power of the State, by appropriate legislation, to provide for the public convenience, stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules."

But in *Illinois Central Ry. Co. v. Illinois*<sup>29</sup> a State law was held void as unnecessarily restraining interstate commerce which required trains to run out of their regular routes in order to make certain specified stops. So also in *Mississippi Railroad Com. v. Illinois Central Ry. Co.*<sup>30</sup> was held void an order of a State railroad commission requiring a railroad company to stop its interstate trains at a specified county seat, when proper and adequate passenger facilities were already otherwise provided. In this case the fact that the interstate trains were carrying the mails is given as one of the reasons why they should not be delayed except for substantial reasons.

### State inspection laws.

State inspection laws in their application to interstate

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<sup>28</sup> 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702.

<sup>29</sup> 163 U. S. 142; 16 Sup. Ct. Rep. 1096; 41 L. ed. 107.

<sup>30</sup> 203 U. S. 335; 27 Sup. Ct. Rep. 90; 51 L. ed. 209. See, also *Atlantic Coast Line Ry. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. Rep. 121; 52 L. ed. 230; *McNeill v. Southern Ry. Co.*, 202 U. S. 543; 26 Sup. Ct. Rep. 722; 50 L. ed. 1142; *L. & N. Ry. Co. v. Central Stock Yards Co.*, 212 U. S. 132; 29 Sup. Ct. Rep. 246; 53 L. ed. 441; *W. U. Tel. Co. v. James*, 162 U. S. 650; 16 Sup. Ct. Rep. 934; 40 L. ed. 1105.

commerce are sustained in so far as they are reasonable regulations in behalf of the health, safety and morality of the inhabitants of the States enacting them, or for their protection against fraud, and do not conflict with existing Federal statutes.<sup>31</sup>

It will later be seen that when Congress has specifically or inferentially recognized a commodity as a legitimate article of interstate commerce, it may not be excluded by a State from its borders whether by an inspection or other police regulation. And even as to all other articles with reference to which there has been no Federal pronouncement, the requirements of a State inspection law must be reasonable in their provisions.<sup>32</sup>

Wild game within a State is not, until reduced to possession, private property, but belongs to the State, which is conceded to have a police power to regulate the

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<sup>31</sup> In *Gibbons v. Ogden*, 9 Wh. 1; 6 L. ed. 23, Marshall says: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce between the States, and prepare it for that purpose."

<sup>32</sup> For cases illustrating the State's inspection powers, see *Turner v. Maryland*, 107 U. S. 38; 2 Sup. Ct. Rep. 44; 27 L. ed. 370; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; 2 Sup. Ct. Rep. 87; 27 L. ed. 383; *Minnesota v. Barber*, 136 U. S. 313; 10 Sup. Ct. Rep. 862; 34 L. ed. 455; *Scott v. Donald*, 165 U. S. 58; 17 Sup. Ct. Rep. 265; 41 L. ed. 632; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345; 18 Sup. Ct. Rep. 862; 43 L. ed. 191; *Asbell v. Kansas*, 209 U. S. 251; 28 Sup. Ct. Rep. 485; 52 L. ed. 778. As to the constitutionality of State quarantine laws, see *Railroad Co. v. Husen*, 95 U. S. 465; 24 L. ed. 527; *Rassmussen v. Idaho*, 181 U. S. 198; 21 Sup. Ct. Rep. 594; 45 L. ed. 820; *Smith v. St. Louis Ry. Co.*, 181 U. S. 248; 21 Sup. Ct. Rep. 603; 45 L. ed. 847; *Reid v. Colorado*, 187 U. S. 137; 23 Sup. Ct. Rep. 92; 47 L. ed. 108; *Compagnie Française v. State Board of Health*, 186 U. S. 380; 22 Sup. Ct. Rep. 811; 46 L. ed. 1209.

times and methods by which it may be captured and killed, or when taken, may be sold. In their efforts to protect their game supplies the States have at times enacted game laws the validity of which has been contested as being regulations of interstate commerce.<sup>33</sup>

**The States may absolutely exclude from their borders only such articles as are intrinsically not merchantable or not legitimate articles of commerce**

In the exercise of their police powers the States may absolutely exclude from their borders only such articles as are in themselves not merchantable or legitimate articles of commerce.<sup>34</sup>

This power of exclusion by the States may not be exercised by the States with reference to articles as a class, unless as an entire class, they are intrinsically unfit for commerce and not merchantable. In all other cases their unfitness for commerce must be determined by inspection and upon reasonable grounds.

In no case may the States exclude from their borders or interfere with the importation of such articles as have directly or impliedly been recognized by Congress as legitimate articles of interstate commerce. And, furthermore, it is an established principle that as to articles legitimately the subjects of commerce, the silence of Congress as to them is to be construed as equivalent to a declaration that interstate trade as to them is to be unrestricted.<sup>35</sup>

These principles have been excellently illustrated with reference to State liquor and oleomargarine laws.

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<sup>33</sup> *Geer v. Connecticut*, 161 U. S. 519; 16 Sup. Ct. Rep. 600; 40 L. ed. 793.

<sup>34</sup> *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

<sup>35</sup> *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. ed. 128.

### Liquor legislation

In *Mugler v. Kansas*<sup>36</sup> certain liquor laws of the State were held not to violate the due process clause of the Fourteenth Amendment.

In the License Cases<sup>37</sup> the constitutionality of the liquor laws of a number of the States was considered with reference to both the Fourteenth Amendment and the commerce clause, and, upon the whole, a considerable power on the part of the States to regulate the sale of imported liquors, recognized.

But in *Bowman v. Railroad*<sup>38</sup> the court explained that it had not in the License Cases passed squarely upon the application of State laws to liquors brought into the States from outside, and, in the case at bar, held invalid, as a regulation of interstate commerce, a law which forbade any common carrier to bring intoxicating liquors within the State from any other States or Territories, without first obtaining a certificate from the proper State officials that the consignees were licensed by the State to sell such liquors.

The argument of the court was that the statute in question was neither an inspection law, nor a police measure confining its direct operation to domestic goods, or to imported goods after they had become commingled with, and therefore a part of, the general goods of the State.

### The Wilson Act

The position taken by the Supreme Court in the *Bowman* and succeeding cases very seriously crippled the powers of the States to control the sale of intoxicating liquors within their borders. That their efficiency in this respect might be, at least partially, restored to them, Con-

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<sup>36</sup> 123 U. S. 623; 8 Sup. Ct. Rep. 273; 31 L. ed. 205.

<sup>37</sup> 5 How. 504; 12 L. ed. 256.

<sup>38</sup> 125 U. S. 465; 8 Sup. Ct. Rep. 689; 31 L. ed. 700.

gress, in 1890, passed the so-called Wilson Act,<sup>39</sup> which act, still in force provides: "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

In *Re Rahrer*<sup>40</sup> the Wilson Act was held constitutional.<sup>41</sup>

### Oleomargarine cases

In *Powell v. Pennsylvania*<sup>42</sup> the court held that a State law which, as a police regulation, laid down certain rules for the manufacture and sale of oleomargarine, was not, as alleged, a violation of the due process of law provision of the Fourteenth Amendment.

<sup>39</sup> 26 Stat. at L. 313.

<sup>40</sup> 140 U. S. 545; 11 Sup. Ct. Rep. 865; 35 L. ed. 572.

<sup>41</sup> For a series of cases interpreting the Wilson Law, and especially the meaning of the phrase "upon arrival in such State," see *Rhodes v. Iowa*, 170 U. S. 412; 18 Sup. Ct. Rep. 664; 42 L. ed. 1088; *Vance v. Vandercook*, 170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. ed. 1100; *Adams Express Co. v. Iowa*, 196 U. S. 147; 25 Sup. Ct. Rep. 185; 49 L. ed. 424; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17; 25 Sup. Ct. Rep. 552; 49 L. ed. 925; *Heymann v. Southern Ry. Co.*, 203 U. S. 270; 27 Sup. Ct. Rep. 104; 51 L. ed. 178; *Delamater v. S. Dakota*, 205 U. S. 93; 27 Sup. Ct. Rep. 447; 51 L. ed. 724; *Adams Express Co. v. Kentucky*, 206 U. S. 129; 27 Sup. Ct. Rep. 606; 51 L. ed. 987. See also § 238 of the Act of Congress of March 4, 1909, codifying, revising and amending the penal laws of the United States, prohibiting all but *bona fide* C. O. D. interstate shipments of liquor. Also, Senate Rpt. 499, 60th Cong., 1st Sess.

<sup>42</sup> 127 U. S. 678; 8 Sup. Ct. Rep. 992; 32 L. ed. 253.



In *Plumley v. Massachusetts*<sup>43</sup> the court again upheld a drastic State law regulating the manufacture and sale of articles simulating butter, as being in violation neither of the Fourteenth Amendment, nor of the Commerce Clause, even when applied to such articles brought from other States. The validity of the law was sustained as a legitimate police provision against fraud, the court as to this saying: "It will be observed that the statute of Massachusetts . . . does not prohibit the manufacture and sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. . . . The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food."

In *Collins v. New Hampshire*<sup>44</sup> it was held that a State cannot render an article of interstate commerce unsalable, as for example by compelling artificial butter to be colored pink, any more than it can prevent its importation.

In *Schollenberger v. Pennsylvania*,<sup>45</sup> however, the court, when asked to enforce a State oleomargarine law with reference to the importation and sale in the original package of oleomargarine manufactured in another State, held the law void in so far as its application to interstate and foreign commerce was concerned. Oleomargarine, the court held, had been recognized by the Federal Government as a proper subject of interstate commerce, and it was, therefore, beyond the competence of the States whether in the exercise of their police powers or other powers, to place restrictions upon its importation or exportation. The court, after a review of earlier cases, say: "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly ex-

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<sup>43</sup> 155 U. S. 461; 15 Sup. Ct. Rep. 154; 39 L. ed. 223.

<sup>44</sup> 171 U. S. 30; 18 Sup. Ct. Rep. 768; 43 L. ed. 60.

<sup>45</sup> 171 U. S. 1; 18 Sup. Ct. Rep. 757; 43 L. ed. 49.

cluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion of an article of food."

### **The States and foreign corporations doing an interstate commerce business**

The right to engage in interstate commerce, it has been often declared, is a Federal right, and is, therefore, independent of State control. In *Vance v. Vandercook*,<sup>46</sup> the right of the individual to import was declared to be "derived from the Constitution of the United States, and does not rest on the grant of the State law."

Nor can a State render illegal or in any way restrain the making of contracts by its residents with reference to interstate commerce.<sup>47</sup>

So, likewise, it is established that a State, though it may refuse admission, or attach such conditions as it sees fit to the entrance of, a foreign corporation within its borders for the purpose of doing business generally within the State, it may not prevent or restrain that corporation, any more than it may prevent or restrain an individual, from engaging in interstate commerce within its borders.<sup>48</sup>

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<sup>46</sup> 170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. ed. 1100.

<sup>47</sup> *Delamater v. S. Dakota*, 205 U. S. 93; 27 Sup. Ct. Rep. 447; 51 L. ed. 724.

<sup>48</sup> *Paul v. Virginia*, 8 Wall. 168; 19 L. ed. 357; *Crutcher v. Kentucky*, 141 U. S. 47; 11 Sup. Ct. Rep. 851; 35 L. ed. 649; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; 24 L. ed. 708. It may be said, generally that a State cannot exclude from its borders a corporation in the employ of, or performing services for, the Federal Government. *Pembina Co. v. Pennsylvania*, 125 U. S. 181; 8 Sup. Ct. Rep. 737; 31 L. ed. 650; *Postal Tel. Co. v. Adams*, 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

A State, though not able to exclude from its borders a federally chartered corporation engaged in interstate commerce, is not compelled to aid that corporation by granting to it any special privileges, as, for example, the right of eminent domain. Congress may, however, endow such a corporation with the right of eminent domain, which right it may exercise within the States without their consent or against their will.

### Foreign corporations "doing business" within the States

Though, as we have seen, a State may not prevent a foreign corporation from carrying on interstate commerce business within its borders, it may prevent it from doing business generally as a corporation within the State; or it may attach such conditions as it sees fit to the doing of such business, other than interstate commerce, as a corporation. But permission to continue to do an interstate business may not be founded upon conditions which, in effect, interfere with interstate business.

In *Western Union Telegraph Co. v. Kansas*<sup>49</sup> the exactions that may be made by a State of a foreign corporation doing an interstate commerce business as a prerequisite to doing a domestic business within a State are carefully considered and prior adjudications examined, and, by a divided court, the doctrine declared that a charter fee of a certain per cent of the entire capital stock might not be exacted of a foreign telegraph company as a condition to being permitted to continue to do an intrastate business within the State. This exaction the major-

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<sup>49</sup> 216 U. S. 1; 30 Sup. Ct. Rep. 190; 54 L. ed. 355. The difficulty of harmonizing this case with that of *Security Mutual Ins. Co. v. Prewitt*, 202 U. S. 246; 26 Sup. Ct. Rep. 619; 50 L. ed. 1013, is referred to, *post*, p. 429. See also *Columbia Law Review*, XI, 393, article "Constitutional Limitations upon State Taxation of Foreign Corporations."

ity of the court declared to be in essence a burden and tax on the company's interstate business and on its property located and used outside of the State.

### State taxation and interstate and foreign commerce

It has already been shown that the States are permitted, in the exercise of the powers reserved to them, substantially to affect interstate and foreign commerce, so long as this interference is an indirect, incidental one, and the legislation in question a legitimate and *bona fide* exercise of a reserved power, and not in contravention to any existing Federal statute or regulation. This principle holds true with reference to the taxing powers of the States. A direct taxation of interstate or foreign commerce, that is, of the goods carried as exports or imports, of the agencies and instrumentalities of such commerce as such, or of the act of carrying on, or the right to engage in or to carry on, interstate and foreign commerce, is always construed as a regulation of such commerce, and, as such, beyond the powers of the States.<sup>50</sup>

This doctrine has now for many years been so well established that States no longer attempt to tax interstate commerce directly. Many State tax laws, however, though not expressly made applicable to interstate commerce transactions, have so substantially burdened commerce among the States as to raise the question whether or not they are not thus brought within the operation of the prohibition. It will be necessary, therefore, to consider the special cases in which the constitutionality of State tax laws have been tested by the Commerce Clause.

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<sup>50</sup> *Leloup v. Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep. 1383; 32 L. ed. 311. A State may not enforce the collection of a valid tax by an injunction restraining an individual or corporation from doing interstate commercial business. *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530; 8 Sup. Ct. Rep. 961; 31 L. ed. 790.

A license tax on an importer, or on the business of importing goods from another State, is a taxation of, and, therefore, an unconstitutional regulation of interstate commerce.<sup>51</sup>

Where, however, a company is doing both interstate and intrastate commerce business, a license tax may be levied upon the latter if it be separable from the former and if the company be left free, should it desire to do so, to give up its domestic business and continue undisturbed its interstate transactions.

It must clearly appear, however, that the license tax is exclusively upon the local business, and that its payment is not a condition precedent to the transaction of interstate business. And, furthermore, if the tax, whatever its name, amounts to more than an ordinary tax upon the property of the company doing both an interstate and domestic business, it will be held void.<sup>52</sup>

Tax laws, or, indeed, any other laws of a State discriminating against non-resident traders or against the products of other States are void as interfering with interstate commerce.<sup>53</sup>

In *Robbins v. Shelby County*, was established the doctrine that the negotiation by sales agents of sales of goods which are in another State for the purpose of introducing them into the State where the negotiation is had, is inter-

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<sup>51</sup> *Brown v. Maryland*, 12 Wh. 419; 6 L. ed. 678; *Leloup v. Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep. 1383; 32 L. ed. 311.

<sup>52</sup> *Pullman Co. v. Adams*, 189 U. S. 420; 23 Sup. Ct. Rep. 494; 47 L. ed. 477; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

<sup>53</sup> *Ward v. Maryland*, 12 Wall. 418; 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275; 23 L. ed. 347; *Guy v. Baltimore*, 100 U. S. 434; 25 L. ed. 743; *Webber v. Virginia*, 103 U. S. 334; 26 L. ed. 565; *Walling v. Michigan*, 116 U. S. 446; 6 Sup. Ct. Rep. 454; 29 L. ed. 691; *Darnell v. Memphis*, 208 U. S. 113; 28 Sup. Ct. Rep. 247; 52 L. ed. 413.

state commerce and not subject to regulation or taxation by the State.<sup>54</sup>

As has been before seen, when property which has been introduced into a State has become commingled with the other property of the State, it ceases to enjoy the protection of the Commerce Clause. And thus it has been held that peddlers, as distinguished from drummers, that is, persons who carry with them the articles which they sell, or at least supply the articles sold from stocks of merchandise already in the State, may be required to pay a license fee, even though they deal exclusively in goods that have been imported from another State; provided, however, of course, that they are not discriminated against because of the fact that they sell goods brought in from outside the State.<sup>55</sup>

### State taxation of articles of commerce

Since *Brown v. Maryland*,<sup>56</sup> decided in 1827, it has been held that a State law requiring all importers of foreign goods, and others selling the same by wholesale to pay a license fee is repugnant to the Commerce Clause. A tax on the sale of an imported article is declared to be a tax on the article itself; and a tax on the importer a tax on the business of importing.

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<sup>54</sup> For later applications of the doctrine, see *Brennan v. Titusville*, 153 U. S. 289; 14 Sup. Ct. Rep. 829; 38 L. ed. 719; *Ficklen v. Shelby Co.*, 145 U. S. 1; 12 Sup. Ct. Rep. 810; 36 L. ed. 601; *Stockard v. Morgan*, 185 U. S. 27; 22 Sup. Ct. Rep. 576; 46 L. ed. 785; *Caldwell v. North Carolina*, 187 U. S. 622; 23 Sup. Ct. Rep. 229; 47 L. ed. 336; *Norfolk Ry. Co. v. Sims*, 191 U. S. 441; 24 Sup. Ct. Rep. 151; 48 L. ed. 254; *Adams Express Co. v. Iowa*, 196 U. S. 147; 25 Sup. Ct. Rep. 185; 49 L. ed. 424; *Rearick v. Pennsylvania*, 203 U. S. 507; 27 Sup. Ct. Rep. 159; 51 L. ed. 295; and *Ware v. Mobile*, 209 U. S. 405; 28 Sup. Ct. Rep. 526; 52 L. ed. 855.

<sup>55</sup> *Machine Co. v. Gage*, 100 U. S. 676; 25 L. ed. 754; *Emert v. Missouri*, 156 U. S. 296; 15 Sup. Ct. Rep. 367; 39 L. ed. 430.

<sup>56</sup> 12 Wh. 419; 6 L. ed. 678.

In *Woodruff v. Parham*<sup>57</sup> the doctrine declared in *Brown v. Maryland* was declared applicable only to imports from foreign countries. As to these it was declared that the States might not exercise their taxing powers until, by the breaking of the original package, or sale by the importer, they had become commingled with the general goods of the States. This limitation upon the taxing powers of the States was deduced from the constitutional prohibitions as to the laying of export or import duties.

As to goods brought into the State from other parts of the United States, however, it was held that the constitutional prohibition does not apply, the terms export and import duties being declared to relate to foreign commerce only. And as to the Commerce Clause it was held that so long as the articles brought in are not discriminated against, no interference with interstate commerce is caused by their taxation, even in their original packages and unsold in the hands of their original consignee.

It will thus be seen that though the States may not, without the permission of Congress, extend the authority of their police regulations over articles of interstate commerce so long as they remain unsold and in their original packages in the hands of their original consignees, the law is otherwise as regards the taxing power.<sup>58</sup>

### State taxation of goods in transit

A difficulty which has not infrequently arisen with reference to the amenability of articles of interstate commerce

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<sup>57</sup> 8 Wall. 123; 19 L. ed. 382.

<sup>58</sup> The right to sell is held to be a part of the right to import and may not be restrained or interfered with by a State whether the article be from another State or from a foreign country. But, it is declared that a tax, if not discriminative, does not operate as a restraint or as a regulation, whereas an exercise of the police power does so operate.

to State taxation is the question when an article may fairly be said to be *in transitu* and when it may be said to have obtained a taxable *situs* in the State. That an article actually in transit from one State to another is not taxable by a State is admitted. That an article manufactured for interstate trade and intended to be sent outside the State, but its transportation thither not yet begun, is taxable in the State where located, is equally well established.<sup>59</sup>

### State taxation of persons in transit

The right of persons to travel from State to State, though apparently not strictly upheld during the early years of the Constitution, has been, since the middle of the last century, well established. Though questioned and not clearly sustained in *New York v. Miln*,<sup>60</sup> and the *License Cases*,<sup>61</sup> it was definitely declared in the *Passenger Cases*,<sup>62</sup> decided in 1848, that persons are subjects of commerce, and, therefore, that their travel from State to State is protected by the Commerce Clause from State interference. Also in *Crandall v. Nevada*,<sup>63</sup> decided in 1868, the right was held to be one which attaches to Federal citizenship, and, therefore, protected from State interference independently of the Commerce Clause.

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<sup>59</sup> *Brown v. Houston*, 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257; *Coe v. Errol*, 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82; 23 Sup. Ct. Rep. 266; 47 L. ed. 394; *Kelly v. Rhoads*, 188 U. S. 1; 23 Sup. Ct. Rep. 259; 47 L. ed. 359; *American Steel & Wire Co. v. Speed*, 192 U. S. 500; 24 Sup. Ct. Rep. 365; 48 L. ed. 538.

<sup>60</sup> 11 Pet. 102; 9 L. ed. 648.

<sup>61</sup> 5 How. 504; 12 L. ed. 256.

<sup>62</sup> 7 How. 283; 12 L. ed. 702. See, also, *Henderson v. Mayor*, 92 U. S. 259; 23 L. ed. 543; and *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; 2 Sup. Ct. Rep. 87; 27 L. ed. 383.

<sup>63</sup> 6 Wall. 35; 18 L. ed. 745.



### Taxation of property of interstate carriers

The right of the States to tax property, as such, of companies doing an interstate commerce business, is determined by the same principles as those stated in *Union Pacific R. R. Co. v. Peniston*,<sup>64</sup> namely, that "State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of this power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of Federal powers."<sup>65</sup>

In determining for purposes of taxation the amount of rolling stock of an interstate carrier, it has been held that a State may ascertain the average number of cars continuously employed in the State, though no particular car may in fact be kept permanently employed in the State.<sup>66</sup>

When valuing the property of carrier companies whose property extends over several States, each State is permitted to tax the amount of property within its own limits

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<sup>64</sup> 18 Wall. 5; 21 L. ed. 787.

<sup>65</sup> See also *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150; 17 Sup. Ct. Rep. 532; 41 L. ed. 953; *Keokuk Bridge Co. v. Illinois*, 175 U. S. 626; 20 Sup. Ct. Rep. 205; 44 L. ed. 299. Vessels, for purposes of taxation usually are treated as having their situs at their home ports, that is, where registered. Where, however, permanently located in another State and doing business there, they may be taxed there. See Judson, *On Taxation*, § 187.

<sup>66</sup> *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613; *Am. Refrigerator Transit Co. v. Hall*, 174 U. S. 70; 19 Sup. Ct. Rep. 599; 43 L. ed. 899.

and to give to that amount a value bearing the same proportion to the value of the entire property of the company as the length of railway or telegraph or telephone line bears to the total length of the carrier system which is assessed.<sup>67</sup>

The courts have, however, at times pointed out that this method of assessment is, after all, but a convenient one applicable in some cases, and that it is not to be erected into an absolute principle; for it might not be acceptable in those cases where it would work obvious injustice. An example of this would be where a railroad company has a large mileage in one State, but over land where construction expenses had been very inexpensive, and where terminal facilities were few and not costly, while in another State its mileage is small, but of expensive construction, and its terminal facilities elaborate and costly.

In *Adams Express Co. v. Ohio*<sup>68</sup> was established what is known as the "unit of use," rule, according to which the property of a company may be determined as a unity, if used as a single system, and that its value may be assessed for purposes of taxation at the value which, as such a unity, it has in use, namely, the net profits which it produces, and irrespective of what may be the value of the tangible property which is owned or employed; and that where this system extends into two or more States each State may, for purposes of taxation, consider as within its borders an amount of property proportioned to the whole, as the amount of business done within the State is proportioned to the whole amount of business done.

### **State taxation of receipts from interstate commerce**

A State tax directly upon and measured by the amount

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<sup>67</sup> *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530; 8 Sup. Ct. Rep. 961; 31 L. ed. 790.

<sup>68</sup> 165 U. S. 194; 17 Sup. Ct. Rep. 305; 41 L. ed. 683. See, also, *Fargo v. Hart*, 193 U. S. 490; 24 Sup. Ct. Rep. 498; 48 L. ed. 761.

of freight carried is, as to interstate freight, a tax on interstate commerce and as such void.<sup>69</sup>

The law with reference to the State taxation of the gross receipts of companies doing an interstate commerce business is, however, not in as definite a shape as might be desired.<sup>70</sup> One general principle may, however, be deduced from all the cases. This is that a State tax is invalid, whatever its form, if in effect it lays a direct burden upon interstate commerce; and that, conversely, a state tax is valid, however measured, (*i. e.* whether by gross receipts or otherwise) or (if we follow the doctrine of *Maine v. Grand Trunk Ry.*) whatever its form, which may be fairly held to be a tax on the property of the company, whether tangible or intangible, located within the State. The tax being thus valid, if valid at all, only as a property tax, it may never amount to more than an ordinary property tax, and its non-payment may never involve a forfeiture of the right of the company to do an interstate commerce business. The doctrine of *Maine v. Grand Trunk Ry. Co.* that a tax measured by the gross receipts may be sustained as a franchise or excise tax upon the right of the company to do business within the State is certainly unsound, and is so recognized by the court in *Galveston H. & S. A. R. R. Co. v. Texas*.

Perhaps the general doctrine which we have been considering is best stated and illustrated in *Postal Telegraph Cable Co. v. Adams*,<sup>71</sup> in which it was held that a State has the power to levy on a foreign telegraph company do-

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<sup>69</sup> *State Freight Tax Case*, 15 Wall. 232; 21 L. ed. 146.

<sup>70</sup> See *State Tax on Ry. Gross Receipts*, 15 Wall. 284; 21 L. ed. 164; *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326; 7 Sup. Ct. Rep. 1118; 30 L. ed. 1200; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; 12 Sup. Ct. Rep. 121; 35 L. ed. 994; *Galveston H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217; 28 Sup. Ct. Rep. 638; 52 L. ed. 1031.

<sup>71</sup> 155 U. S. 688; 15 Sup. Ct. Rep. 268; 39 L. ed. 311.

ing both a domestic and an interstate business a franchise tax, the amount thereof being graduated according to the value of the property within the State, such tax being in lieu of all other taxes. Though in terms a franchise tax, the tax was held valid as, in fact, taking the place of a property tax, which of course, the State might constitutionally levy. The court say: "A tax (may be) imposed on a corporation on account of its property within the State and may take the form of a tax on the privilege of exercising its franchise within the State, and if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

### Charter provisions

The State which grants a charter to a railroad company may, as a condition precedent to the grant, stipulate that the company shall pay into the State's treasury a certain percentage of its receipts, or be liable to a certain tax on the amount of its capital stock, or to a special property tax, and the fact that these receipts are derived from its interstate commerce business, or that its property is so employed does not render the stipulation void. The sums so paid are not paid because of the interstate commerce done, but as a payment to the State for the charter which it has obtained, and which the State could grant or withhold as it might see fit.<sup>72</sup>

But a State may not in a charter which it grants reserve to itself a right to regulate the interstate commerce busi-

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<sup>72</sup> *Railroad v. Maryland*, 21 Wall. 456; 22 L. ed. 678. Cf. Prentice and Egan, *Commerce Clause*, 299, and authorities there cited.

ness of a corporation, for it does not lie within the power of a State thus by its own act to obtain an authority over matters vested exclusively in the Federal Government.<sup>73</sup>

### **Taxation of capital stock of interstate commerce companies**

Because of the control which a State has over corporations of its own creation, it is held that it may tax the entire capital stock of domestic corporations, even though some of the property of these corporations is situated outside of the taxing State. For such a tax is held to be not upon the property which in large measure gives the value to the capital stock, but upon the corporation as an entity, over which entity the State has full personal jurisdiction. The same rule is applied to foreign corporations which have been permitted to consolidate with and thus become constituent elements of domestic corporations.<sup>74</sup>

As to foreign corporations doing interstate commerce business, it is held that their capital stock may be taxed only to the extent that such corporations have property within the taxing States.<sup>75</sup>

### **State regulation of carriers**

In the absence of Congressional regulation the common

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<sup>73</sup> *Louisville Ry. Co. v. Railroad Com. of Tenn.*, 19 Fed. Rep. 679.

<sup>74</sup> *Ashley v. Ryan*, 153 U. S. 436; 14 Sup. Ct. Rep. 865; 38 L. ed. 773.

<sup>75</sup> *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep. 826; 29 L. ed. 158. As to the levying of a franchise tax upon foreign corporations seeking to do also an intrastate business, see *W. U. Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. Rep. 190, 54 L. ed. 355, and *Pullman Co. v. Kansas*, 216 U. S. 56; 30 Sup. Ct. Rep. 232; 54 L. ed. 378. In *W. U. Tel. Co. v. New Hope*, 187 U. S. 419; 23 Sup. Ct. Rep. 204; 47 L. ed. 240, and *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160; 23 Sup. Ct. Rep. 817; 47 L. ed. 995, it is held that a State tax sufficient to meet approximately the expenses of legitimate police supervision may be imposed upon an interstate carrier.

law of the States controls with reference to the so-called common-law rights, duties, and responsibilities of interstate carriers. These rights and duties which relate to reasonableness of service, impartiality of treatment of shippers, liabilities either contractual or in tort for injuries to passengers or freights, etc., have, in many instances, it is apparent, more than a local significance and effect, and it is, therefore, somewhat difficult to justify, upon principle, the constitutional authority of the States in these respects. Practical necessity and convenience seem, however, to have demanded that this validity should be ascribed to the common-law of the States, for otherwise, in the absence of Congressional regulation, there would be no law whatever for the courts to apply.<sup>76</sup>

### State regulation of railway rates

The general constitutional power of the States to regulate the rates of public service corporations, including railway and other transportation corporations, whether of domestic or foreign incorporation, or of industries affected by a public interest is well established. The only Federal limitations upon this power are: those of the Fourteenth Amendment requiring the equal protection of the laws and that the rates thus fixed shall not be so unreasonable as to amount to a taking of property without due process of law; and that, under the guise of an attempt at the regulation of domestic services, interstate

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<sup>76</sup> *W. U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; 21 Sup. Ct. Rep. 561; 45 L. ed. 765; *Mo. Ry. Co. v. Larabee Flour Co.*, 211 U. S. 612; 29 Sup. Ct. Rep. 214; 53 L. ed. 352; *McNeill v. Southern Ry. Co.*, 202 U. S. 543; 26 Sup. Ct. Rep. 722; 50 L. ed. 1142; *Lake Shore Ry. Co. v. Ohio*, 173 U. S. 285; 19 Sup. Ct. Rep. 465; 43 L. ed. 702. As to the lack of a Federal common law, see *United States v. Worrall*, 2 Dall. 384; 1 L. ed. 426; *Wheaton v. Peters*, 8 Pet. 591; 8 L. ed. 1055.

commerce shall not be unduly affected. That to a certain extent the regulation of domestic railroad rates should affect interstate service has been recognized by the courts as unavoidable, but, so long as this interference is not too pronounced or serious, the laws have not been held thereby unconstitutional and void.<sup>77</sup>

In still further limitation of the power of the States to regulate domestic rates of public service corporations, is the doctrine that a State, in determining whether a proposed rate will leave a reasonable net profit to the company, may not take into consideration the entire business of the company if some of that business is interstate in character.<sup>78</sup>

#### **Routes running outside the State but with both terminals within the State**

It is established that a State may not, without violating the Commerce Clause, fix and enforce rates for the continuous transportation of goods between two points within the State, when a part of the route is, however, outside the State. The doctrine though not at first very positively stated may be considered as firmly adopted since the decision of *Hanley v. Kansas City Southern Ry. Co.*<sup>79</sup>

It would seem that the doctrine as to the taxation of receipts for transportation over routes running outside

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<sup>77</sup> *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4; 30 L. ed. 244, modifying the doctrines of *Munn v. Illinois*, 94 U. S. 113; 24 L. ed. 77, and other cases. The subject is again carefully examined in *Covington & Cinn. Bridge Co. v. Kentucky*, 154 U. S. 204; 14 Sup. Ct. Rep. 1087; 38 L. ed. 962. See also in the lower Federal courts, *Shepard v. N. P. Ry. Co.*, 184 Fed. 765; *L. & N. Ry. Co. v. Siler*, 186 Fed. 176; *In re Arkansas Rate Cases*, 187 Fed. 290.

<sup>78</sup> *Smyth v. Ames*, 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819. As to railroads federally chartered see *Reagan v. Trust Co.*, 154 U. S. 418; 14 Sup. Ct. Rep. 1062; 38 L. ed. 1030.

<sup>79</sup> 187 U. S. 617; 23 Sup. Ct. Rep. 214; 47 L. ed. 333.

the State but between points within the State is not to be so strictly construed against the States as is that of the regulation of the rates. This is on the theory that the transportation over such routes is a unit and must be charged for as such, whereas a tax on the railway company based on the amount of transportation over its roads within the State is a reasonable one. Such a tax as this was upheld in *Lehigh Valley R. R. Co. v. Pennsylvania*,<sup>80</sup> and, it is to be admitted, that the language employed by the court would seem to indicate that commerce carried on between two points within the same State is to be considered in all cases domestic even when part of the route lies outside the State. But when the attempt was made to apply the same doctrine to the State regulation of rates, the court, in *Hanley v. Kansas City Southern Railway Co.* speaking of the decisions of State courts which had applied the doctrine of the Lehigh case to rate regulations said: "We are of opinion that they carry their conclusion too far. That [the Lehigh case] was the case of a tax, and was distinguished expressly from an attempt of a State directly to regulate the transportation while outside its borders."

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<sup>80</sup> 145 U. S. 192; 12 Sup. Ct. Rep. 806; 36 L. ed. 672.



## CHAPTER XXXIII

### FEDERAL LEGISLATIVE POWER OVER INTERSTATE COM- MERCE

#### **Federal legislation**

In the chapters which have gone before, the extent of the powers of the States with reference to interstate commerce has been considered. In the present chapter we shall have to deal with the extent of the regulative, that is to say, of the legislative power, granted to Congress by the Commerce Clause.

Until 1887 the constitutional power granted the Federal Government by the Commerce Clause was employed by that government only by way of preventing the exercise of unconstitutional powers by the States. No attempt was made up to that time to put into exercise the affirmative legislative powers granted by that clause. In 1887, however, an act of Congress was passed establishing the Interstate Commerce Commission, and laying down certain regulations in accordance with which interstate commerce should be carried on, and providing for the enforcement of these regulations by the Commission and by the Federal courts. In 1890, by the so-called Sherman Anti-Trust Act, interstate commerce was subjected to still further regulation; and, by the act of 1906, the whole matter of railway rates was subjected to affirmative Federal control. By these and by other less important legislative acts, as well as by other and more radical measures which have been urged for enactment by Congress, the question as to the extent of the legislative powers of Congress with reference to foreign and interstate commerce

has become one of great present importance. The character of the legislation already enacted will appear in the discussion which is to follow.

Over interstate commerce, the Federal Government has an authority equal in extent to that possessed by the States over domestic commerce or by the United States with reference to foreign commerce. This the Supreme Court has repeatedly declared.<sup>1</sup>

The control of interstate and foreign commerce being granted to the Federal Government without limitation, the grant is, according to the general principle governing the interpretation of grants of Federal powers, construed to be plenary. This was stated in absolute terms by Marshall in *Gibbons v. Ogden*,<sup>2</sup> and has never been questioned. "This power," said the Chief Justice, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restriction on the exercise of the power as are found in the Constitution of the United States."

### **Federal police regulations**

Congress has enacted various laws for the regulation of

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<sup>1</sup> *Brown v. Houston*, 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257.

<sup>2</sup> 9 Wh. 1; 6 L. ed. 23. See also *Champion & Ames*, 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

interstate and foreign commerce, which, so far as their substance is concerned, may properly be denominated police regulations. Among them are those relating to the use of safety appliances, hours of service of employees, monthly reports of accidents, arbitration of controversies between railroads and their employees, the exclusion of impure goods and lottery tickets from interstate transportation, employers' liability, etc. Strictly speaking, however, the constitutional authority of this legislation has not been derived from any general "police power" possessed by the Federal Government, but from the grant of authority in the Commerce Clause. That these laws, in so far as they are constitutional, draw their validity from this clause and not from a Federal police power is a corollary from the general doctrine that the General Government possesses no powers whatever except by way of express grant, and powers implied from such grants.<sup>3</sup>

### Prohibition of interstate commerce

That the power to regulate includes the power to prohibit the interstate transportation of at least certain classes of commodities has been placed beyond question by the decision of the court in *Champion v. Ames*.<sup>4</sup>

That Congress might prohibit commerce with the Indians had been decided in *United States v. Holliday*,<sup>5</sup> but for the authority so to do it was not necessary to resort exclusively to the Commerce Clause. So also the power of Congress to prohibit foreign commerce was early exercised in the so-called Embargo Acts at the time of the War of 1812 but here also a source of authority outside the Commerce Clause could, if necessary, be found, namely,

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<sup>3</sup> See *Columbia Law Review*, IV, 563, article "Is There a Federal Police Power?" by Paul Fuller.

<sup>4</sup> 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

<sup>5</sup> 3 Wall. 407; 18 L. ed. 182.

in the control of international relations. When, however, the question arose as to prohibitions upon interstate commerce, the argument was made that "regulation" might be federally exercised only for the maintenance of perfect equality as to commercial rights among the States, and for the protection and encouragement, and not for the destruction of interstate trade. The authority of Congress to exclude diseased cattle, dangerous explosives, and goods and persons infected with disease, was conceded, for thereby, it was pointed out, legitimate interstate commerce was in effect protected from injury or destruction. But when the question arose as to the Federal right to exclude lottery tickets from interstate transportation which, whatever might be the morality or expediency of the lottery to which they related, could not, in themselves, be considered a commodity the transportation of which was attended with danger of injury to interstate trade, the point was urged that Congress was putting the Commerce Clause to a use which its framers had not intended. That, in other words, the term "regulation" as employed in that term could not properly be so defined as to include measures intended, and by necessary effect calculated, not to protect or encourage or regulate interstate commerce itself, but to check an evil the control of which by direct legislation was admittedly beyond the authority of Congress.

To this argument, the Supreme Court in *Champion v. Ames*, replied that lotteries, though in earlier years considered innocuous, had come to be generally viewed as pestilential and as such had come under the ban of the law of most, if not all, of the States. Therefore, it was argued, the traffic in lottery tickets is one "which no one can be entitled to pursue as of right." "If," the court say, "a State, when considering legislation for the suppression of lotteries within its own limits may properly

take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? ”

As regards the argument that, if it be granted that the Federal Government has the power to prohibit the interstate transportation of lottery tickets, it will logically follow that Congress may arbitrarily exclude from interstate commerce any article or commodity it may see fit, and from whatever motive, the majority justices say: “It will be time enough to consider the constitutionality of such legislation when we must do so.” The court however add that the power of Congress to regulate commerce among the States though plenary is not arbitrary. The possible abuse of a power is, nevertheless, declared to be no argument against its existence.

By § I of the so-called Hepburn Railway Rate Act of 1906, it is provided that “From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have an interest, direct or indirect, except such articles and commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.”

The constitutionality of this “Commodities Clause” was sustained by the Supreme Court in *United States v. Delaware & H. Ry. Co.*,<sup>6</sup> decided May 3, 1909. The objec-

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<sup>6</sup> 213 U. S. 366; 29 Sup. Ct. Rep. 527; 53 L. ed. 836. In *United*

tions that it was in violation to the Fifth Amendment to the Constitution and that it attempted the regulation of a matter not directly concerned with interstate commerce were overruled. It was, however, declared that the ownership by a railway carrier of stock in *bona fide* corporations manufacturing, producing or owning the commodity carried, is not the "interest direct or indirect," in such commodity, forbidden by the Act.

As regards the constitutionality of the prohibition as within the power of Congress to regulate commerce, the court held the principle to have been practically determined in the case of *New York, N. H. & H. R. R. Co. v. Interstate Commerce Commission*<sup>7</sup> in which it was held that the prohibitions of the Interstate Commerce Act as to rebates and disuniformity of rates operated to prevent a carrier from buying and selling a commodity in such a way as to defeat the provisions of the act, and that as so construed, the prohibition was constitutional even though it might have the effect of rendering practically impossible the buying or selling by a carrier of a commodity which it transported. The court, however, say, in the later case, that the doctrine is not rested "upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities, or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce."

*States v. Lehigh Valley R. R. Co.*, 31 Sup. Ct. Rep. 377; 55 L. ed. 458, however, the court declare that the construction of the earlier case does not exclude from the operation of the act cases where a carrier so exerts its powers as a stockholder in the corporation owning or producing the commodity carried as to deprive that corporation of all real independent existence and make it virtually an agency of the carrier.

<sup>7</sup> 200 U. S. 361; 26 Sup. Ct. Rep. 272; 50 L. ed. 515.

Whether or not the court, when the question is squarely submitted to it, will hold that, under its power to regulate foreign and interstate commerce, Congress has an unlimited power to exclude, at its will, commodities from such commerce it is not possible to say.<sup>8</sup> The Commodities Clause of the Hepburn Act was sustained as directed against a practice which directly interfered with free and equal competition in the transportation of articles between the States and between the United States and foreign countries. It was, therefore, not the arbitrary exclusion of certain commodities from such commerce. The exclusion of lottery tickets was indeed expressly defended upon the ground that the lottery business is a disreputable one and harmful to the public and in fact prohibited in most of the States. But the business itself was beyond the direct control of Congress, and it would seem, therefore, that the exclusion was really an exercise by Congress of an arbitrary right to exclude. It is possible, however, that the court may distinguish between the prohibition of the carrying of articles which are calculated to injure or deceive those to whom they are sent, (as for example lottery tickets and impure and misbranded foods and drugs,) and commodities unobjectionable in themselves, but manufactured or produced under conditions alleged to be undesirable, as for example, goods produced in factories, or mines employing women or children. A doctrine justifying the power of Congress to exclude commodities of the first class, and denying the

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<sup>8</sup> The right of Congress to exclude from interstate and foreign commerce articles in themselves obnoxious or dangerous to transport, as, for example, explosives, or commodities infected with disease, and capable of spreading the infection, is of course clearly defensible as a regulation of commerce. In the Lottery Case the lottery tickets are spoken of as "polluting" interstate commerce, but it is clear that this could not be so in any real sense of the word.

power as to articles in the second class, can, however, only be drawn by asserting that the United States cannot rationally be presumed to be obliged to lend the aid of one of its agencies to the effectuation of what Congress may hold to be an evil. But to this it may be replied not only that by promoting interstate and foreign commerce in commodities of the second class the United States really gives its aid to a business of which it disapproves as much as it would by permitting commerce in articles of the first class, but that, by assuming as a premise that interstate and foreign commerce carriers act as agencies of the United States, the position is necessarily taken that the right to engage in interstate and foreign commerce is one that owes its existence to Federal creation and not one existing under State law but subject to Federal regulation. If this be so, the plenary power of Congress to exclude necessarily follows, for, the right to engage in interstate or foreign commerce being its creation—express or implied—the authority to limit or deny that right necessarily results. It would seem that the decision in the Lottery Case necessarily involves this doctrine, and yet in the later case of *Howard v. Illinois Central R. R. Co.*,<sup>9</sup> the court emphatically repudiate the doctrine that a company by engaging in interstate commerce subjects itself to possible Federal regulation of all its activities, and declare that it rests upon the conception “that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress.” “It is apparent,” the court continue, “that if the contention were

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<sup>9</sup> 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. ed. 297.



well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

The foregoing statements are made with reference to the engaging in interstate commerce of carrier companies, and not as to the recognition or denial of commodities as legitimate articles of interstate commerce. It would seem however, that the principle applicable to the one would necessarily be applicable to the other. If, as a condition of the right of a carrier company to engage in interstate commerce, Congress may not require conditions which have no relation to that commerce, it would seem that Congress may not exercise the right to exclude articles from commerce except in so far as there is some quality peculiar to such articles which renders their transportation dangerous or otherwise objectionable. Yet, as has been seen, the exclusion of lottery tickets from interstate commerce was upheld though no such characteristic could be predicated of them.

It is clear then that the Lottery Case cannot be harmonized with the Howard Case, and that if the necessary premise of that case that the right to engage in interstate commerce is a federally created one, and interstate commerce itself an instrument of the Federal Government, be pushed to its logical extreme there is justified that obliteration of State powers which is described in the Howard case.

### **The Federal Employers' Liability Law of 1906**

In 1906 Congress passed an act entitled "An Act Relating to the Liability of Common Carriers in the District of

Columbia and Territories and Common Carriers engaged in Commerce between the States and between the States and Foreign Nations to their Employees," by which act the fellow-servant doctrine of the common law was considerably modified. By the terms of this act "every common carrier in trade or commerce" in the District of Columbia or in the Territories or between the several States was made liable for the death or injury of "any of its employees" which should result from the negligence of "any of its officers, agents or employees." It thus appears that the provisions of the acts were made applicable to these companies irrespective of the fact whether the person injured or killed was engaged at the time in interstate commerce. The only criterion prescribed was that the employing company was not carrying on commerce among the States. There was thus raised the fundamental question whether the simple fact that a company or corporation is, in any part of its business, engaged in carrying on interstate commerce renders it subject to Federal regulation as to all its activities. There was also raised the question whether the relation between an employing company and its employees is itself a part of the interstate commerce which the company carries on. Both of these questions were discussed in *Howard v. Illinois Central R. Co.*<sup>10</sup>

The first and more important of these questions, the court, as has already been said, answered in the negative. The relation of master and servant was declared to be connected with the commerce carried on by the former, and as such subject to Federal regulation in so far as interstate transportation might be concerned. The act in question, however, was held not so limited, and was therefore declared void.<sup>11</sup>

<sup>10</sup> 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. ed. 297.

<sup>11</sup> But later held valid as to the District of Columbia, and, in-

In order to meet the constitutional objections raised by the Supreme Court to the act of 1906, Congress in 1908 enacted a measure similar to the earlier law except that its provisions are expressly confined to actions growing out of injuries or deaths to persons while actually engaged in carrying on interstate commerce.

The constitutionality of this measure has not been passed upon by the Supreme Court.

By a series of acts beginning with that of 1893, Congress has sought to increase the safety of interstate trains by requiring that they be equipped with certain safety devices. The constitutionality of these measures has been affirmed.<sup>12</sup> So also by act of 1907 Congress has limited the number of hours of work of employees upon interstate trains.

By an act of October 1, 1888, later repealed and replaced by that of June 1, 1898, Congress has made provision for the arbitration of disputes between interstate carriers and their employees. Section 10 declares that it shall be a misdemeanor for an employer or his agent to require of an employee, as a condition of employment, that he will not become or remain a member of a trade union, or threaten him with loss of employment if he becomes or remains a member.

In the case of *Adair v. United States*,<sup>13</sup> an agent of a railway company engaged in interstate commerce, was charged with having, in violation of the Tenth Section of the act of 1898, dismissed from the service of the company an employee because of his membership in a labor organization. *Adair* set up the unconstitutionality of this section on the double ground that it was a violation of the

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ferentially, as to the Territories, in *El Paso & N. W. Ry. Co. v. Gutierrez*, 215 U. S. 87; 30 Sup. Ct. Rep. 21; 54 L. ed. 106.

<sup>12</sup> *St. Louis, etc., Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. ed. 1061.

<sup>13</sup> 208 U. S. 161; 28 Sup. Ct. Rep. 277; 52 L. ed. 436.

Fifth Amendment, being a deprivation of liberty without due process of law; and that it was not justified by the Commerce Clause, and, therefore, void as relating to matters the regulation of which is reserved exclusively to the States. Both of these contentions were held sound by the Supreme Court. As to the latter of these points, the opinion denies that there is any "possible legal or logical connection" between an employee's membership in a labor organization and the carrying on of interstate commerce. It cannot be assumed, the court assert, that the fitness or diligence of the employee is in any wise determined by such membership. As to the constitutionality of the provisions of the act with reference to arbitration no opinion is expressed.

### **Regulation of interstate railroad rates**

The regulation of railway rates may be directed either to the prevention of discriminatory treatment as between places or shippers, or to the prevention of unreasonably high charges for service. As to this latter, the government may limit its intervention to declaring invalid, if excessive, rates fixed by the companies, or it may itself undertake to declare, and compel the acceptance by the railway companies of, rates which are considered as reasonably just.

That with respect to interstate transportation the Federal Government may exercise any or all of these powers of rate regulation is established.

The general principle that a legislature may delegate to a commission as its agent the application to specific cases of a rule legislatively determined, is not disputed.

By the act of June 29, 1906, it is declared by Congress that "charges for interstate transportation of passengers as property shall be just and reasonable;" and to the Interstate Commerce Commission is given the authority,

after having decided that a rate in force is not a proper one, "to determine and prescribe what shall be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged." Thus the only rule for determining the rates which Congress has declared for the guidance of the Commission in the fixing of specific rates is that they shall be just and reasonable. The determination of when these very general requirements are met by a rate is left in each case, to the judgment of the Commission.<sup>14</sup>

### **The Federal Anti-trust Act**

By the Interstate Commerce Act of 1887, interstate railroads are forbidden to form combinations or "pools" for the maintenance of rates, whether for freight or passenger traffic. By the act of July 2, 1890, entitled "An Act to Protect Commerce Against Unlawful Restraints and Monopolies," a general prohibition is laid upon "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." In *United States v. Trans-Missouri Freight Association*<sup>15</sup> the railroads were held to be included within this general prohibition.

Based upon alleged violations of this act of 1890 a series of suits have been brought and have received final adjudication by the Supreme Court. For the decision of these cases the court has found it necessary to consider more carefully than in any other set of cases the question

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<sup>14</sup> The questions involved in the power of the courts to review decisions of the Commission are discussed in the chapter "The Conclusiveness of Administrative Determinations." As to principles that must control the Commission in fixing rates, see *S. Pacific Ry. v. Interstate Com. Com.*, 219 U. S. 433; 31 Sup. Ct. Rep. 288; 55 L. ed. 283.

<sup>15</sup> 166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007.

what constitutes interstate commerce, and what, therefore, are the limits of the Federal regulative power under the Commerce Clause. Thus, though it cannot be said that these cases have necessitated the enunciation of constitutional doctrines not elsewhere stated, or already considered in this treatise, they have resulted in specific adjudications which serve to set in the clearest light the extent and limits of the Federal commercial power. For this reason it is advisable to consider these cases *seriatim*.

In *Re Green*, a case involving the status of the Distilling and Cattle Feeding Company, which controlled 95 per cent. of distilled liquors in the United States, the court held that the mere magnitude of an interstate business did not bring it within the prohibition of the Anti-Trust Act.

The first case to reach the Supreme Court was the so-called Sugar Trust Case of *United States v. E. C. Knight Co.*<sup>16</sup>

In this case it was contended by the Government that the acquisition by the American Sugar Refining Co. of the stock of a number of sugar refining corporations of Pennsylvania was with the object and effect of establishing a substantial monopoly of the industry, and that inasmuch as the product was sold throughout the country and distributed among the States, the provision of the act of 1890 with reference to the monopolization or combination or conspiracy to monopolize trade and commerce among the States was violated. The court, however, applying the doctrine of *Coe v. Errol*<sup>17</sup> and *Kidd v. Pearson*,<sup>18</sup> held that the act did not, and constitutionally could not, extend to combinations, conspiracies or monopolies relating to the manufacture of commodities, this being a

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<sup>16</sup> 156 U. S. 1; 15 Sup. Ct. Rep. 249; 39 L. ed. 325.

<sup>17</sup> 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

<sup>18</sup> 128 U. S. 1; 9 Sup. Ct. Rep. 6; 32 L. ed. 346.

field reserved exclusively to the States. The fact that interstate or foreign trade might be incidentally affected was declared not material.

The doctrine laid down by the court has never been departed from, and is, indeed, one from which there would seem to be no logical escape, if the line which divides Federal control of interstate commerce from State regulation of local industries and manufacturing is to be maintained. In applying this doctrine, however, the court, in later cases, has shown a much greater readiness to find in the acts complained of, a direct interference with interstate commerce, and, therefore, a ground for the application of the Federal statute.

In *United States v. Trans-Missouri Freight Association*<sup>19</sup> the act was held to apply to railroads, and moreover, that contracts or combinations in restraint of trade were by the act prohibited, whether or not those contracts were in themselves reasonable. In this case a contract between several railway companies was held illegal, and the resulting association, the purpose of which was to maintain rates and prevent competition over a territory including a number of States, was dissolved.

In *United States v. Joint Traffic Association*<sup>20</sup> the doctrine of the *Trans-Missouri Freight Association* case was affirmed.

In *Hopkins v. United States*<sup>21</sup> it was held that a live stock commission merchant whose place of business was a certain stock yard and who there bought and sold stock for others, was not engaged in interstate commerce, within the meaning of the act of 1890, although the stock was shipped to him from another State. Therefore, it was held, the rules and regulations of an association of live

<sup>19</sup> 166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007.

<sup>20</sup> 171 U. S. 505; 19 Sup. Ct. Rep. 25; 43 L. ed. 259.

<sup>21</sup> 171 U. S. 578; 19 Sup. Ct. Rep. 40; 43 L. ed. 290.

stock commission merchants, fixing the rates to be charged, were not agreements affecting interstate commerce.

In *Anderson v. the United States*,<sup>22</sup> decided the same day as the *Hopkins* case, an association of dealers in live stock, providing by its rules that its members should not transact business with non-members, nor with the commission men who should deal with non-members, was held not a combination or conspiracy in restraint of interstate trade, inasmuch as it appeared that membership was open to all dealers, and no attempt was made to control prices or the number of cattle bought nor in any way to prevent full competition between the members. In this case the ground taken by the court was not so much that the combination did not relate to interstate commerce, as that there was no restraint imposed upon commerce by its rules, nor an attempt to monopolize such commerce.

In a series of cases, beginning with *Addyston Pipe & Steel Co. v. United States*,<sup>23</sup> the court has shown that combinations or agreements between manufacturers or dealers do not come within the protection of the doctrine of the *Knight* case if it appears that the attempt is made in any way directly to control or change what would normally be the course of interstate commerce in the absence of such combinations or agreements.

In the *Addyston* case six companies, engaged in the manufacture and sale of iron pipe, had formed a combination whereby competition in the sale of iron pipe throughout the United States was practically destroyed. In the exercise of the power thus possessed, the combination had allotted to its several member companies the territory within which each should have the exclusive right to sell its products. By a unanimous opinion the court held the

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<sup>22</sup> 171 U. S. 604; 19 Sup. Ct. Rep. 50; 43 L. ed. 300.

<sup>23</sup> 175 U. S. 211; 20 Sup. Ct. Rep. 96; 44 L. ed. 136.



agreement to come within the prohibition of the act of 1890.

In *Montague v. Lowry*<sup>24</sup> was held illegal as a restraint of interstate commerce an association of dealers in the State of California and manufacturers in other States, with the purpose of controlling the sale of their product in California. Here there was no allotment of territory as in the *Addyston* case, and, except as to the provision of the agreement that the non-resident manufacturers should sell their product only to the members of the association in California, no interstate transaction was regulated. This provision, however, it was held, rendered the entire combination a violation of the act of 1890. "It was not a combination or monopoly among manufacturers simply but one between them and dealers in the manufactured article of commerce between the States."

In the so-called *Merger* case, *Northern Securities Co. v. United States*,<sup>25</sup> the act of 1890 was held applicable to a combination of stockholders in the competing interstate railway companies, the aim, or at least the effect of which was to prevent or render possible the prevention of competition between the two roads by transferring their stock to a single holding company, organized under the laws of a State, which holding company thereby became possessed of a controlling interest in the stock of each of the railway companies.

In this case it was strenuously urged that the combination or agreement represented by the holding company was one which, in itself, had no direct relation to interstate commerce, the company being an investment company and not itself a carrier company; and the question thus reduced itself to whether the United States had, under its

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<sup>24</sup> 193 U. S. 38; 24 Sup. Ct. Rep. 307; 48 L. ed. 608.

<sup>25</sup> 193 U. S. 197; 24 Sup. Ct. Rep. 436; 48 L. ed. 679.

commercial power, the constitutional authority to regulate the transference and holding of the shares of stock of state corporations.

To this argument the court replied that the real question at issue was not as to the power of the United States to regulate the holding of stock of State corporations, but as to the power of State corporations to restrain or monopolize interstate commerce. It was admitted that contracts or combinations relating to the holding of stock of interstate carrier companies have not, generally speaking, a direct relation to interstate commerce, and therefore, that, as to them, the doctrine of the Knight case would apply. But in the present case the court found that the Merger Company was not a *bona fide* investment company, but was, in its very inception and sole design, a scheme for controlling interstate commerce.

The so-called Beef Trust Case, *Swift & Co. v. United States*,<sup>26</sup> decided in 1905, added no new principle to the law of interstate commerce. The act of 1890 was held to have been violated by a combination of independent meat dealers in an attempt to monopolize commerce in fresh meat among the States, and to restrict the competition of their respective buyers when purchasing stock for them in the stock yards. It is significant, however, that the court emphasized that the unlawfulness of the general scheme was sufficient to render unlawful the constituent acts, which in themselves and apart from their place in the general scheme, might not have been in violation of the Anti-Trust Act. "The plan may make the parts unlawful."

In *Loewe v. Lawler*<sup>27</sup> the court took a very advanced ground as to what will be construed to be an interference

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<sup>26</sup> 196 U. S. 375; 25 Sup. Ct. Rep. 276; 49 L. ed. 518.

<sup>27</sup> 208 U. S. 274; 28 Sup. Ct. Rep. 301; 52 L. ed. 488.

with interstate commerce. In this case the act of 1890 was held to have been violated by a combination of members of a labor organization, in the nature of a boycott, to prevent the manufacture of hats intended for transportation beyond the State, and to prevent their vendees in other States from reselling the hats, and from further negotiating with the manufacturers for further purchases. In order to bring this combination within the terms of the Federal statute the court again emphasized that where the general purpose and effect of the plan is to restrain interstate trade, the separate acts, though in themselves acts within a State and beyond Federal cognizance, become illegal as tested by the Federal law.<sup>28</sup>

In the Standard Oil and American Tobacco Co. cases,<sup>29</sup> there was almost no further discussion by the court of

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<sup>28</sup> For other cases construing the act of 1890, see *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; 28 Sup. Ct. Rep. 572; 52 L. ed. 865; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; 22 Sup. Ct. Rep. 431; 46 L. ed. 679; *Continental Wall Paper Co. v. Voight*, 212 U. S. 515; 29 Sup. Ct. Rep. 280; 53 L. ed. 486; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; 29 Sup. Ct. Rep. 511; 53 L. ed. 826. As to the constitutionality of the "Elkins Act" of 1907 (32 Stat. at L. 847), prohibiting rebates, see *N. Y. Central & H. R. Ry. Co. v. United States*, 212 U. S. 481; 29 Sup. Ct. Rep. 304, 53 L. ed. 613. As to the constitutionality of the "Carmack Amendment" of June 29, 1906, to the act of 1887, imposing upon an interstate carrier liability to the holder of a bill of lading for loss or injury to freight occurring anywhere *en route*, with right of recovery against the connecting carrier actually causing the loss or injury, see *Atlantic Coast Line R. R. v. Riverside Mills*, 219 U. S. 186; 31 Sup. Ct. Rep. 164; 55 L. ed. 167. For an excellent account of the Commerce Court established by the act of June, 1910, see the article by J. W. Bryan, "The Railroad Bill and the Court of Commerce" in the *American Political Science Review*, Nov., 1910.

<sup>29</sup> *Standard Oil Co. v. United States*, 221 U. S. 1; 31 Sup. Ct. Rep. 502, decided May 22, 1911; *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. Rep. 632, decided May 29, 1911.

the question whether the acts complained of constituted an interference with interstate commerce. That there was such an interference was assumed to be beyond serious dispute. With reference to the Knight case the court simply say: "The view . . . which the argument takes of that case, and the arguments based upon that view, have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been as necessarily, and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice" (citing cases). The chief significance, then, of these cases, aside from this summary disposal of the Knight case, is one of statutory construction, that is, of the Anti-Trust Act of 1890. In effect the court, in these two cases, held that though the act is still to be interpreted as forbidding every contract or combination in restraint of trade between the States, not every agreement between competitors which affects interstate trade, and, in a measure, checks competition in that trade, is in restraint of interstate trade, but only those agreements or acts are to be so construed which unduly or unreasonably affect interstate trade; and that any direct attempt to monopolize such trade, or to obtain the power arbitrarily to control prices or competition therein, is such an undue interference and therefore within the prohibition of the act. What shall be held to constitute a restraint of interstate commerce it is declared, is to be determined by the intent of the law as revealed by a study of legal and economic conditions preceding and attending the enactment of the Act in 1890.

### **The Federal control of corporations under the commerce clause**

The Federal Government has the undoubted power itself to own and operate, or to incorporate companies for

the construction and operation of roads, bridges, and other instrumentalities of interstate commerce.<sup>30</sup> This authority is derived not only from the Commerce Clause but from the authority of the Federal Government to establish post-offices and post-roads, and from its military powers. And, incidental to the exercise of these powers, the right of eminent domain may be exercised by the Federal Government or by corporations chartered by it, within the States and Territories.<sup>31</sup>

In *Wilson v. Shaw*<sup>32</sup> the authority of the United States to construct the interoceanic canal across the territory ceded by the Republic of Panama, is declared.

It has been argued that the Federal Government has the constitutional power to charter companies not only to do an interstate carrier or exporting business, but, as incidental thereto, to manufacture and produce the goods which they export or transport. Some support for the doctrine has been claimed from the cases in which it has been held that the National Banks, chartered primarily to serve a Federal function, may also be authorized, as incidental thereto, to do a general banking business within the States. But it is by no means sure that these bank cases will be held to furnish this support. In the case of the National Banks it will be remembered that it was held that it was not practicable for them to exist as banks and to perform the Federal functions which they were created to perform, unless, at the same time, they are permitted to do a general banking business. As to interstate carrier or exporting companies, however, it would seem that there

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<sup>30</sup> *Calif. v. Central Pacific Ry. Co.*, 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150; *Monongahela Navigation Co. v. United States*, 148 U. S. 312; 13 Sup. Ct. Rep. 622; 37 L. ed. 463; *Luxton v. North River Bridge Co.*, 153 U. S. 525; 14 Sup. Ct. Rep. 891; 38 L. ed. 808.

<sup>31</sup> *Kohl v. United States*, 91 U. S. 367; 23 L. ed. 449.

<sup>32</sup> 204 U. S. 24; 27 Sup. Ct. Rep. 233; 51 L. ed. 351,

is not the same necessity that they should be permitted to carry on a manufacturing business. Indeed, by the Federal Hepburn Act of 1906, interstate railways are expressly forbidden to have a direct or indirect interest in the commodities which they transport.

It would seem, however, that federally incorporated interstate carrier companies may be authorized to carry on also an intrastate carrier business. Here the connection between the two would seem to be as close as that between the general banking business and the purely Federal functions of the National Banks.

The denial to Congress of the power to charter companies empowered to do a manufacturing business within the States does not necessarily carry with it the denial of a power to require of individuals or of state-chartered companies a Federal permission to engage in interstate commerce whether as carriers or as shippers of goods across State borders. Certainly this is so if the right to engage in interstate commerce or to make use of interstate commercial instrumentalities be held to be a Federal right. The lottery case of *Champion v. Ames* <sup>33</sup> has illustrated the extent of this Federal power to exclude commodities from interstate trade. Applying the doctrines of this case it may be held that while Congress may not be able to charter manufacturing companies, which the States may not exclude from their borders, it may refuse to individuals or State-chartered companies the right to ship their products across State lines, except upon certain conditions, which conditions may be so stated as to bring the companies and the individuals, so far as they make use of interstate commerce agencies, within a rigorous Federal control.<sup>34</sup>

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<sup>33</sup> 188 U. S. 321; 23 Sup. Ct. Rep. 321; 47 L. ed. 492.

<sup>34</sup> Cf. *Veazie Bank v. Fenno*, 8 Wall. 533; 19 L. ed. 482; *United States v. Marigold*, 9 How. 560; 13 L. ed. 257; *United States v. Joint Traffic Assn.*, 171 U. S. 505; 19 Sup. Ct. Rep. 25; 43 L. ed. 259.

**Federal taxing power and interstate commerce**

A Federal tax may be laid upon interstate commerce, its instrumentalities, the articles carried, or the privilege of engaging in it, either as a revenue measure or as a means of regulation. If the tax should be laid for a regulative purpose, its constitutionality would be dependent wholly upon the Commerce Clause, and, not being, except in form, a tax, would not be subject to the express limitations as to apportionment, etc., imposed by the Constitution upon the taxing power of the United States.<sup>35</sup>

A genuine tax imposed for revenue purposes, if assessed upon the commodities of interstate commerce or upon the instrumentalities of commerce as property, would be a direct tax and would have to be apportioned among the States according to their respective populations. That this is so sufficiently appears from the doctrines of *Pollock v. Farmers' L. & T. Co.*<sup>36</sup>

If the tax should be one upon the privilege of engaging in, or carrying on interstate commerce, it would in all probability be construed to be constitutionally an indirect tax.<sup>37</sup>

A more doubtful point, however, is whether such an excise tax upon the right to engage in interstate commerce would not come within the constitutional provision that "no tax or duty shall be laid on articles exported from any State." That it would be held to be a tax on exports from a State would seem to follow from the reasoning of the court in *Brown v. Maryland*;<sup>38</sup> but, if the doctrine of

<sup>35</sup> *Veazie Bank v. Fenno*, 8 Wall. 533; 19 L. ed. 482.

<sup>36</sup> 158 U. S. 601; 15 Sup. Ct. Rep. 912; 39 L. ed. 1108.

<sup>37</sup> The cases that would probably be held controlling as to this, are, *Nicol v. Ames*, 173 U. S. 509; 19 Sup. Ct. Rep. 522; 43 L. ed. 786; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397; 24 Sup. Ct. Rep. 376; 48 L. ed. 496; *Flint v. Stone Tracy Co.*, 220 U. S. 107; 31 Sup. Ct. Rep. 342; 55 L. ed. 389.

<sup>38</sup> 12 Wh. 419; 6 L. ed. 678.

*Woodruff v. Parham*<sup>39</sup> be followed, it will be held that the prohibition of the Constitution applied only to exports from a State to foreign countries.

### **Federal control of navigable waters**

In a later chapter will be considered the Federal powers, both judicial and legislative, which flow from the provision of § 2, Art. III of the Constitution, which provides that the Federal Judicial power shall extend "to all cases of admiralty and maritime jurisdiction." It will there appear that, under this grant of authority, the National Government has been construed to have a general authority over all acts directly connected with or occurring upon the navigable waters of the United States. These navigable waters have been construed to be all waters, whether tidal or not, and whether located wholly within a single State or not, which are navigable in fact, or are susceptible of being so used, as highways over which trade and travel may be conducted. Navigability has thus been accepted as the test of Federal admiralty jurisdiction. It is thus apparent that the Federal authority thus obtained is a more comprehensive one than that derived from the Commerce Clause.

Congress has by various acts established regulations governing the use of the "navigable waters of the United States," which have been defined to be, as distinguished from the navigable waters of the States (concerning which Congress has not seen fit to legislate), those waters which "form in their ordinary condition, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."<sup>40</sup>

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<sup>39</sup> 8 Wall. 123; 19 L. ed. 382.

<sup>40</sup> The *Daniel Ball*, 10 Wall. 557; 19 L. ed. 999.



In the absence of conflicting congressional legislation, the States are left free to regulate transportation upon the navigable waters within their respective borders. In all cases Congress has, of course, the authority to supersede the regulations of the States which are considered to operate as an obstruction to navigation.

### **Federal control of foreign commerce**

The same clause which gives to Congress the power to regulate commerce among the States extends the power to commerce with foreign nations. It has been declared that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."<sup>41</sup> This is true, and yet the control which the United States may exercise over foreign commerce is broader than that which it may exercise over interstate commerce for the reason that it is able to draw additional powers from Constitutional sources other than the Commerce Clause. Thus especially from the exclusive and plenary authority over foreign relations granted to it, the Federal Government is able to control the admission of aliens, to provide for their deportation, to grant special commercial privileges by treaty, and to lay a total or partial embargo upon foreign commerce. In *Buttfield v. Stranahan*<sup>42</sup> the court also suggest the possibility that the Federal authority over interstate commerce may be, in certain directions, limited by the reserved rights of the States, which limitations would not apply to foreign commerce.

By Clause 6 of § 9 of the Constitution the limitation is laid upon the power granted in the Commerce Clause that "no preference shall be given by any regulation of com-

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<sup>41</sup> *Brown v. Houston*, 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257.

<sup>42</sup> 192 U. S. 470; 24 Sup. Ct. Rep. 349; 48 L. ed. 525.

merce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."

This clause has received little judicial construction. One of the few cases in which the meaning of the clause has been considered is *Pennsylvania v. W. & B. Bridge Co.*,<sup>43</sup> in which it is declared that "what is forbidden is not discrimination between individual ports within the same or different States, but discrimination between the States."

### Commerce with the Territories and with the District of Columbia

The Commerce Clause contains no reference to trade between the States and the Territories or the District of Columbia, or the Territories *inter se*. In general however, the courts have treated the District of Columbia and the territories as "States" within the meaning of the Clause.<sup>44</sup>

Congress having exclusive jurisdiction within and over the District and the Territories, there of course cannot arise, as to them, the objection that Federal regulations extend to matters that are of domestic concern.

### Commerce with Indians

So long as the Indians form distinct communities occupying clearly defined territories, even though those territories be within the borders of the States, intercourse with them is a matter subject to Federal regulation, and this Federal power of regulation extends to the prohibition of sales to Indians within a State and beyond the borders of the Indian Reservation. The Federal control

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<sup>43</sup> 18 Wall. 421; 15 L. ed. 435.

<sup>44</sup> *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. Rep. 256; 32 L. ed. 637. But see *Michigan Law Review*, II, 468.

of commerce with the Indians, given by the Commerce Clause, is thus seen to be supplemented by the general jurisdiction of the National Government over Indians as wards of the Nation.<sup>45</sup>

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<sup>45</sup> *United States v. Kagama*, 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228; *United States v. Holliday*, 3 Wall. 407; 18 L. ed. 182.

## CHAPTER XXXIV

### OTHER POWERS OF CONGRESS

#### **Naturalization**

Clause 4 of § 8 of Art. 1. of the Constitution gives to Congress the power to establish "an uniform rule of naturalization."

This power has already been considered in an earlier chapter dealing with citizenship and it is here necessary only to add that the power, though in an early and ill considered case held to be one that may be concurrently exercised by the States, was in *Chirac v. Chirac*,<sup>1</sup> decided in 1817, declared to be exclusively in Congress and this doctrine has not since been questioned.

#### **Bankruptcy: definition of**

The same clause which gives to Congress the power to establish an uniform rule of naturalization, authorizes that body to "establish uniform laws on the subject of bankruptcies throughout the United States."

The construction which has been given to this clause furnishes one of the few exceptions to the general rule that the technical terms of the Constitution are to be given the meaning which they had at the time the Constitution was adopted. In 1789 "bankruptcy" and "insolvency" had, in the English law, different and distinct meanings. Bankruptcy applied only to merchants or traders charged with having committed some fraudulent or quasi-fraudulent act upon their creditors, who there-

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<sup>1</sup> 2 Wh. 259; 4 L. ed. 234.

upon might institute proceedings to have their debtor declared a bankrupt, his property taken and distributed in payment of his debts, and he himself either discharged from further liability therefor, or imprisoned as the court might think fit. Insolvency, upon the other hand, described the status of a debtor, not a trader, who, in order to obtain a discharge might in certain cases surrender, or offer to surrender, all his property in payment of his debts.

In this country, however, from the beginning Congress and the Supreme Court have given to the term "Bankruptcy" a meaning broad enough to cover "Insolvency" as well. Indeed the distinction between the two was not generally recognized in the colonies before the separation from England.

By various acts Congress has, from time to time, enacted laws providing for both voluntary and involuntary bankruptcy, that is for proceedings instituted by the debtor himself or *in invitum* by his creditors. The details of this legislation need not here be given. It is sufficient to say that the first law was enacted in 1800, and repealed in 1803; the second law in 1841 was repealed in 1843; the third in 1867, and after being several times amended, repealed in 1878; the fourth law, now in force, being passed July 1, 1898.

In *Sturges v. Crowninshield*,<sup>2</sup> affirmed in *Ogden v. Saunders*,<sup>3</sup> the court held that the power to establish bankruptcy laws is not exclusively vested in Congress, but may be exercised by the States in the absence of Federal Legislation.

#### **State bankruptcy laws and the obligation of contracts**

The right of the States, in the absence of conflicting

<sup>2</sup> 4 Wh. 122; 4 L. ed. 529.

<sup>3</sup> 12 Wh. 213; 6 L. ed. 606.

congressional legislation, to enact bankruptcy laws is limited by the provision of the Constitution that no State shall pass any law impairing the obligation of contracts. Indeed, if we are to accept the statement of the court in *Hanover v. Moyses*<sup>4</sup> this prohibition was made for this express purpose.

In *Sturges v. Crowninshield* the court held invalid a State law which discharged the debtor from a contract entered into previous to its passage.

In *Ogden v. Saunders*, the court held valid a State bankruptcy law which discharged the debtor and his future acquisitions of property so far as it related to debts contracted subsequent to the passage of the law. The law was, thus, in effect, read into each contract as a clause thereof.

The authority of the States to deal by bankruptcy or other laws with contracts entered into subsequent to their enactment is plenary.<sup>5</sup>

### **State laws have no extraterritorial force**

In *Ogden v. Saunders* was laid down the important principle that a certificate of discharge under a State law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The creditor of another State is, however, concluded by the discharge in bankruptcy if by appearance or otherwise he has made himself a party to the original insolvency proceedings.

The United States is, of course, not under this territorial limitation in the exercise of its bankruptcy powers, and, furthermore, it is not limited with reference to the impair-

<sup>4</sup> 186 U. S. 181; 22 Sup. Ct. Rep. 857; 46 L. ed. 1113.

<sup>5</sup> *Edwards v. Kearzey*, 96 U. S. 595; 24 L. ed. 793; *Denny v. Bennett*, 128 U. S. 489; 9 Sup. Ct. Rep. 134; 32 L. ed. 491.

ment of the obligation of contracts. National bankrupt laws may, therefore, be made applicable to contracts already entered into at the time of their passage.<sup>6</sup>

It is, however, required of national bankrupt laws that they shall be uniform. The uniformity is a geographical one. The laws must, in all their provisions, be equally applicable to all of the States, and to incorporated territories.<sup>7</sup>

**State laws suspended but not annulled by Federal bankruptcy laws: Effect of the law of 1898**

The enactment of a national bankrupt law does not operate to annul state laws on the same subject, but simply to suspend their operation so long as the national regulation is in force. Upon the repeal of the Federal law the State laws at once revive, and do not need re-enactment. So also a State law passed while a Federal bankruptcy law is in force goes at once into force with the repeal of the Federal Statute.<sup>8</sup>

The precise effect of the enactment of a Federal bankruptcy law in suspending the operation of existing State laws is not definitely determined from either the decisions of the State or Federal courts. That a State law covering the same ground as the national act, even though its provisions be not inconsistent therewith, is suspended is generally, though not uniformly, admitted. If, then, it is conceded that the intention of Congress was, by the enactment of a bankruptcy law, to cover the entire subject, all State laws relating to bankruptcy are suspended while the national law remains in force.<sup>9</sup>

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<sup>6</sup> *Hanover Bank v. Moyses*, 186 U. S. 181; 22 Sup. Ct. Rep. 857; 46 L. ed. 1113.

<sup>7</sup> *Quære* as to unincorporated Territories.

<sup>8</sup> *Butler v. Goreley*, 146 U. S. 303; 13 Sup. Ct. Rep. 84; 36 L. ed. 981.

<sup>9</sup> *Tua v. Carriere*, 117 U. S. 201; 6 Sup. Ct. Rep. 565; 29 L. ed. 855.

Even if the view be accepted that by the act of 1898, the general subject of bankruptcy was fully covered there still remains, in many cases, the difficulty of determining when State laws relating to general assignments for the benefit of creditors, receiverships of corporations, etc., may be held to be in the nature of bankruptcy laws and as such rendered inoperative during the existence of the Federal law.

### **Coinage**

Congress is given power "to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures."

The authority thus given has been freely exercised by Congress but this legislation has given rise to very few constitutional questions.

It is to be observed that power is given not only to coin, but to provide what shall be the legal tender value of the pieces coined. There has been no question but that the States possess no concurrent jurisdiction. The power is an exclusively Federal one.<sup>10</sup>

### **Weights and measures**

With reference to standards of weights and measurements the States are recognized to have power to legislate in the absence of congressional action.

### **Counterfeiting**

Congress is expressly given the power "to provide for the punishment of counterfeiting the securities and current

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See the excellent article of Professor Williston in *Harvard Law Review*, XXII, 547, entitled "The Effect of a National Bankruptcy Law upon State Laws."

<sup>10</sup> By Art. I, § 10, cl. 1 of the Constitution, the States are expressly denied the power to coin money.



coin of the United States.” There is little doubt, however, that, had the power not been expressly given, it would have been held implied in the power given to coin. The power of Congress to prohibit and to provide punishment for the counterfeiting of the coins and securities of foreign countries is considered in *United States v. Arjona*.<sup>11</sup>

The passing of counterfeit coins or securities is an offense distinct from that of coining or “uttering” them, but the power to punish the former is implied in the power to forbid the latter.

Under its powers to regulate commerce and to punish counterfeiting, Congress has been held to have the power to provide punishment for the bringing into the United States, with intent to pass the same, false, forged, or counterfeit coin, as well as for the passage or uttering of the same.

In *Fox v. Ohio* <sup>12</sup> it was held that the grant of power to the United States to punish the uttering and passing of counterfeits of its coins did not deprive the States of the power to render penal and to punish these acts. It was pointed out by the court that the same act might thus constitute as to its character and consequences an offense against both the State and the Federal governments. This doctrine was approved in *United States v. Marigold*.<sup>13</sup>

### **Postal service: Federal power**

The Federal control of the postal service is granted in the clause of Art. I, § 8, which provides that Congress shall have the power “to establish post-offices and post-roads.”

In early years the view was maintained by some that by this grant Congress was given the power only to desig-

<sup>11</sup> 120 U. S. 479; 7 Sup. Ct. Rep. 628; 30 L. ed. 728.

<sup>12</sup> *Fox v. Ohio*, 5 How. 410; 12 L. ed. 213,

<sup>13</sup> 9 How. 560; 13 L. ed. 257.

nate the routes over which the mails should be carried, and the post-offices where they should be received and distributed, and to exercise the necessary protection in relation thereto, and that it did not provide the authority to construct and operate agencies for the carrying and distributing of mails. This was substantially the view taken by Monroe in the paper sent to Congress in connection with his veto, in 1822, of the Cumberland Road bill.

In considerable measure Congress in its legislation has kept within the limits of the powers conceded to it by Monroe, but, when it has thought it wise, it has not hesitated to overstep them, and its Constitutional right so to do has for years been conceded.

In *California v. Central Pacific R. R. Co.*,<sup>14</sup> the power of Congress to construct, or to authorize individuals to construct railroads across the States and Territories was held to be implied not only in the power given to Congress to regulate commerce, but in its authority to provide for postal facilities and military exigencies.

#### **Exclusion from the mails: Freedom of press: Searches and seizures: *Ex parte Jackson***

In *Ex parte Jackson* <sup>15</sup> was questioned the constitutional power of Congress to exclude lottery tickets from the mails, and in determining this the court found it necessary to consider the general extent of the administrative control that might be exercised over the postal services and especially the relation thereof to the constitutionally guaranteed immunity of the people against unreasonable searches and seizures, as well as their right to freedom of the press. In its opinion the court pointed out that without Constitutional objection having been made, the power

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<sup>14</sup> 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 1050.

<sup>15</sup> 96 U. S. 727; 24 L. ed. 877.

vested in Congress "to establish post-offices and post-roads," had, from the beginning, been construed to authorize not only the designation of the routes over which the mails should be carried, the location of the offices wherein the mail matter should be received and distributed, the carriage of that matter, and the establishment of regulations providing for its safe and speedy transit and prompt delivery, but the determination of what matter should be carried, its classification, its weight and form, and the charges to be made. The right to designate what shall be carried, it is declared, carries with it the right to determine what shall be excluded.

However, the difficulty in this case arose not so much in establishing the powers of Congress to exclude objectional matter from the mails, as in upholding the power to provide measures for enforcing effectively the rules of exclusion which might be legislatively declared. For, obviously, the presence in the mails of the proscribed matter could be determined only by examination of the mail matter by the proper administrative officer, and the granting of such a right of examination, it was claimed, was in violation of constitutionally guaranteed rights of the people. As to this the court declared:

"Whilst regulations excluding matter from the mails cannot be enforced in a way which will require or permit an examination into letters, or sealed packages subject to letter postage. without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon a competent evidence of their violation obtained in other ways; as from the parties receiving the letter and packages, or from agents depositing them in the post-office, or others cognizant of the facts. As to the objectionable printed matter which is open to examination, the regulation may be enforced in a similar way, by the imposition of penalties for their violation through the

courts, and, in some cases, by the direct action of the officers of the postal service. In many instances, those officers can act upon their own inspection, and, from the nature of the case, must act without other proof; as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases no difficulty arises and no principle is violated in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by everyone, and is in its nature conclusive. In excluding various articles from the mails, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

In *Ex parte Rapier* <sup>16</sup> it was again urged that Congress was without the constitutional power to forbid the use of the mails to lottery tickets, circulars, etc., but this time upon the ground that Congress was without the power to declare the lottery itself a criminal enterprise. To this the court replied: "It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime and immorality. We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress may be held, in its enactment, to have abridged the freedom of the press."

It will be observed that the cases *Ex parte Jackson* and *In re Rapier* go no further than to sustain the power of

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<sup>16</sup> 143 U. S. 110; 12 Sup. Ct. Rep. 374; 36 L. ed. 93.

the United States to exclude from the mails matter which it deems objectionable. They do not decide that Congress may permit the sending into a State and the delivery therein of matter considered seditious, immoral, or otherwise objectionable by the State. This point has never been passed upon by the Supreme Court. It has, however, been debated in Congress and there is an opinion of the United States Attorney-General Cushing<sup>17</sup> that Congress has not this power. This opinion declares that while the Federal Government has full control, free from State interference, to regulate the transmission of the mails up to the time of their receipt by the postmaster of the office to which they are directed, the States may, in the exercise of their acknowledged police power, prevent their citizens from receiving incendiary or other matter which they deem objectionable.

From the opinion rendered in the *Ex parte Jackson* and other cases, it would appear that the States are without the power to conduct postal operations over post-roads in competition or conflict with the United States, but that they may permit, or themselves provide for, the carrying of letters or merchandise in other ways, as, for instance, by express companies, and this too, with reference to material excluded by Congress from the mails as immoral, fraudulent, or otherwise objectionable. However, the distribution of matter treasonable to the United States or inciting resistance to its laws may of course not be authorized, nor may interstate commerce be regulated.

In a later chapter<sup>18</sup> dealing with administrative powers will be discussed the extent of the discretionary power that may be granted the Postmaster-General and his agents in excluding matter from the mails under so-called "fraud orders."

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<sup>17</sup> 8 Op. Atty. Gen. 489.

<sup>18</sup> Chapter LIV.

**Protection of the mails: In re Debs**

*In Re Debs* <sup>19</sup> was presented the question whether, for the protection of the mails, as well as of interstate commerce, the Federal Government may, by the use of judicial restraining orders or the employment of its armed forces, prevent interferences, or whether it is obliged to wait until there has been such interference, and then punish the guilty ones in its courts. The court held that the former as well as the latter means are open to it.

**Patents**

Congress is given the power "to promote the progress of useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The granting by the United States of a patent right does not give to the patentee the authority to exercise it in a State in violation of the police laws of that State,<sup>20</sup> or of the United States.<sup>21</sup>

**Copyrights—Trade-marks**

In the Trade-Mark Cases <sup>22</sup> it was held that the ordinary trade-mark has no necessary relation to invention or discovery, and, therefore, that its use may not be regulated by Congress under the power to provide for the issuance of patents and copyrights. Lacking this authority the court held that the Federal Government has power to legislate with reference to trade-marks only in so far as their use

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<sup>19</sup> 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

<sup>20</sup> *Patterson v. Kentucky*, 97 U. S. 501; 24 L. ed. 1115; *Webber v. Virginia*, 103 U. S. 334; 26 L. ed. 565; *Allen v. Riley*, 203 U. S. 347; 27 Sup. Ct. Rep. 95; 51 L. ed. 216.

<sup>21</sup> *United States v. Standard Sanitary Mfg. Co.* ("Bath Tub-Trust"), U. S. Cir. Ct., decided Oct. 13, 1911.

<sup>22</sup> 100 U. S. 82; 25 L. ed. 550.

in interstate trade is concerned. The law in question in the case not being thus limited was held void.

### Piracies, etc.

The power of the United States to define and punish piracies and other crimes committed on the high seas, and offenses against the law of nations, may be supported upon three constitutional grants,—one express and two implied. In Art. I, § 8, Clause 10, it is expressly given. It may be implied from the Federal admiralty and maritime jurisdiction, and from the general control granted to the Federal Government in all that concerns foreign affairs. The implied power to define and punish crimes under the maritime jurisdiction is broader, territorially, than that given in Art. I, § 8, Clause 10, inasmuch as admiralty jurisdiction has been construed to extend not only over the high seas, but over all public navigable waters.

The authority given to Congress to define and punish all offenses against the law of nations would seem to be broad enough to authorize the prohibition and punishment of acts which, though committed within the territorial limits of the several States, may give rise to international responsibilities upon the part of the United States. It would also seem that this authority may be implied from the general fact that to the Federal Government is given the exclusive control of foreign relations, and that to it alone foreign States look for redress of any injuries which they may conceive themselves to have suffered. Where the responsibility is imposed, the right to prevent its accruing may properly be implied.<sup>23</sup>

By the clause under discussion Congress is given the power not simply to provide for the punishment of piracy

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<sup>23</sup> *United States v. Arjona*, 120 U. S. 479; 7 Sup. Ct. Rep. 628; 30 L. ed. 728.

as defined by the law of nations, but itself to define what shall constitute the offense and punish it as such. Thus, for example, the slave trade, though not declared by international law to be piracy, has by Congress been declared so to be.

### **Declaration of war**

War, that is, a contest the parties to which have been recognized as belligerents, is a status that gives rise to numerous legal consequences to the parties involved, to neutral powers, to the actual combatants, and to non-combatants. In all countries it is, therefore, a matter of great importance what authority shall have the constitutional power of creating such a status, and of determining the date of its beginning.

That, under our Constitution, the United States may begin war against a foreign country only by a declaration issued by Congress has never been disputed, the Constitution expressly providing that Congress shall have the power to declare war. That a foreign nation, or insurrectionary body of citizens, may by invasion of the United States or by other acts bring about a condition of affairs which will warrant the President, in declaring in advance of congressional legislation that a state of war exists, was asserted by the Supreme Court in the *Prize Cases*.<sup>24</sup>

The powers of Congress with reference to the prosecution of a war, and some of the legal incidents to a state of war are discussed in later chapters.

### **Letters of marque and reprisal and captures on land and water**

Congress is authorized by the Constitution to grant letters of marque and reprisal and to make rules concerning captures on land and water.

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<sup>24</sup> 2 Black. 635; 17 L. ed. 459.



It has been held that letters of marque may be granted to privateers to make captures within the territorial waters of the United States as well as upon the high seas.<sup>25</sup>

Similarly Congress may make rules concerning captures within the United States as well as upon the high seas or upon foreign soil.<sup>26</sup>

### **Other military powers**

The express powers given to Congress with reference to raising and supporting armies, the organizing, arming, disciplining, and calling forth the militia to execute the laws of the Union, and, generally, the powers of Congress with reference to the prosecution of a war, are considered elsewhere.

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<sup>25</sup> *The Experiment*, 8 Wh. 261; 5 L. ed. 612.

<sup>26</sup> *Brown v. United States*, 8 Cr. 110; 3 L. ed. 504.

## CHAPTER XXXV

### PROHIBITIONS ON CONGRESS

#### **Absolute and qualified prohibitions**

In the chapters which have gone before the powers of Congress have been considered. In connection therewith have been discussed the express and implied limitations which restrain Congress in the exercise of those powers.

In the present chapter we shall have to deal with the general limitations laid by the Constitution upon Congress, either by way of the absolute denial to Congress of a power, or by way of express provision that certain powers shall be exercised only under certain specified circumstances.

It would seem that certain of these limitations thus expressly imposed operate as an absolute denial to Congress of a legislative power with reference to the subjects specified, without regard to time or place. Others of these limitations, as was held in the Insular Cases, serve to restrain the legislative powers of Congress only when dealing with the States and incorporated territories.<sup>1</sup>

#### **Importation of slaves**

The provision of the Constitution that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808," has, of course, become obsolete.

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<sup>1</sup> Downes v. Bidwell, 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

With respect to the immigration of persons into the United States, the authority of the United States is exclusive as regards its commerce power, or its control of foreign relations. The States may not levy a tax on persons entering the United States, such a tax not being relieved from the constitutional objection that it is an interference with commerce by describing it in its title as in aid of an inspection law which authorizes immigrants to be inspected with reference to their being criminals, paupers, lunatics, or persons liable to become a public charge. Inspection laws, the Supreme Court has declared, have reference to property and not to persons.<sup>2</sup>

### **Suspension of habeas corpus**

The provision that the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it, is considered in a later chapter dealing with Martial Law.<sup>3</sup>

### **Bills of attainder**

Clause 3 of § IX of Art. I provides that "No bill of attainder . . . shall be passed."

This clause has given rise to an inconsiderable number of judicial determinations. The principal case in definition of a bill of attainder is that of *Cummings v. Missouri*,<sup>4</sup> in which the court held unconstitutional the test oath of loyalty imposed by the Constitution of Missouri as a condition precedent to holding any State office of trust or profit, or practicing the profession of the law or ministry. The court declared: "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of

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<sup>2</sup> *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59; 2 Sup. Ct. Rep. 87; 27 L. ed. 383.

<sup>3</sup> Chapter LII.

<sup>4</sup> 4 Wall. 277; 18 L. ed. 356.

pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body in addition to its legitimate functions, exercises the powers and office of a judge, it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of a trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notion of the enormity of the offense."

The opinion then goes on to declare that the questioned clauses of the Missouri Constitution are also invalid as *ex post facto* legislation, being aimed at past rather than future acts.

In *Ex parte Garland*,<sup>5</sup> decided at the same time as the Cummings case, the court held void, as a bill of attainder, the act of Congress of January 24, 1865, prescribing as a qualification for admission as an attorney before the Federal courts an oath that the deponent had never voluntarily borne arms against the United States, given aid to its enemies, etc.

A statute making the non-payment of taxes evidence of disloyalty during the Civil War and providing for the forfeiture of lands without a judicial hearing was held to be a bill of attainder,<sup>6</sup> as was a law excluding from the United States Chinese who are citizens of the United States.<sup>7</sup>

### **Ex post facto legislation**

The same clause of the Constitution which prohibits bills of attainder declares that no *ex post facto* legislation shall be valid.

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<sup>5</sup> 4 Wall. 333; 18 L. ed. 366.

<sup>6</sup> *Martin v. Snowden*, 18 Gratt. 100.

<sup>7</sup> *In re Yang Sing Hee*, 13 Saw. 486.

In the early case of *Calder v. Bull*<sup>8</sup> the prohibition was declared to relate only to criminal and not to civil proceedings, and, as thus limited, *ex post facto* laws were declared to be "every law that makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Every law that alters the legal rules of evidence, and requires less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

By later decisions this definition of *ex post facto* legislation has been broadened so as to include all laws which in any way operate to the detriment of one accused of a crime committed prior to the enactment of such laws.<sup>9</sup>

### Appropriations

It is provided that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

This restriction, it is apparent, operates rather upon the officials of the Treasury Department than upon Congress. The legislative body is left free to authorize such expenditures as it may see fit, and to direct the payment to be made by the Secretary of the Treasury. This direction having been given by law, no discretionary power is left with the Treasury Department to determine whether the payment is a proper one.<sup>10</sup>

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<sup>8</sup> 3 Dall. 386; 1 L. ed. 648.

<sup>9</sup> *Thompson v. Utah*, 170 U. S. 343; 18 Sup. Ct. Rep. 620; 42 L. ed. 1061. In this case the earlier cases are carefully reviewed.

<sup>10</sup> *United States v. Price*, 116 U. S. 43; 6 Sup. Ct. Rep. 235; 29 L. ed. 541.

Congress may, as has been earlier pointed out, appropriate sums of money for private purposes; for the construction and maintenance of works which the United States could not constitutionally itself construct or operate; and recognize and pay claims of merely an equitable or moral nature.<sup>11</sup>

That money once covered into the United States Treasury may not, by a judicial process, be recovered therefrom without the sanction of an act of Congress, is further discussed under the title "Suability of the United States."<sup>12</sup>

### Jury trial

By Art. III, § II, Clause 3, it is provided that "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed in any State, the trial shall be at such a place or places as the Congress may by law have directed."

By the Sixth Amendment, this requirement of a trial by jury is repeated and the additional condition imposed that the trial of persons accused of crime shall be speedy and public, the jury an impartial one, selected from the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.

The relation between this Amendment, and the third

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<sup>11</sup> *United States v. Realty Co.*, 163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215.

<sup>12</sup> Chapter XLV.

clause of § II of Art. III is, as stated in *Callan v. Wilson*,<sup>13</sup> that in the latter are enumerated, *ex abundanti cautela*, the rights to which, according to settled rules of common law, the accused is entitled.

Offenses committed outside the jurisdiction of a State are not local, but may be tried at such places as may be designated by Congress.

In *Capital Traction Co. v. Hof*,<sup>14</sup> "trial by jury" is declared to be "a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence." Unanimity in the verdict is essential, as are twelve jurors.<sup>15</sup>

### Courts and actions in which jury not required

The right of trial by jury provided for in the Constitution applies only in the Federal courts, and in them it applies only to those cases in which, by common practice at the time the Constitution was adopted, it was employed in the colonies and in England. Thus it does not apply to equity causes, to cases in admiralty or to military courts, nor where the special prerogative rights of court are involved, as, for example, in proceedings for disbarment or for contempt.<sup>16</sup>

Furthermore, it has been generally recognized by courts, Federal as well as State, that the guarantee of the right to a trial by jury does not apply to the petty offenses,

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<sup>13</sup> 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223. See also Story, *Commentaries*, § 1791.

<sup>14</sup> 174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873.

<sup>15</sup> *Springville v. Thomas*, 166 U. S. 707; 17 Sup. Ct. Rep. 717; 41 L. ed. 1172.

<sup>16</sup> *In re Debs*, 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

which, at the time the Constitution was adopted, it was generally recognized might be more summarily dealt with. The enjoyment of the right is not, however, limited to felonies.<sup>17</sup>

### **Infamous crimes**

The provision of the Fifth Amendment that no one shall be held to trial for a criminal offense unless on a presentment or an indictment of a grand jury, is especially limited to capital or other infamous crimes. It would seem that there is no hard and fast definition, in American law at least, of an "infamous crime," each case having thus to be decided on its merits.<sup>18</sup>

The practical construction which the cases have put upon the constitutional provision with reference to indictments has been that there must be an indictment in every case in which the imprisonment may be for more than a year, inasmuch as by § 5541 of the Revised Statutes it is provided that whenever a person is sentenced to more than one year's imprisonment he may be required to serve the sentence in a penitentiary. By the provision of § 335 of the act of March 4, 1909, revising, amending and codifying the penal laws of the United States, it is declared that "all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

### **Waiver of constitutional guaranties**

The law governing the waiver by the accused of his constitutional right to a trial by jury in criminal actions, or to a trial by less than twelve jurors, and, indeed, the waiver of any constitutional guaranty, is not in a clearly deter-

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<sup>17</sup> *Callan v. Wilson*, 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223.

<sup>18</sup> *Ex parte Wilson*, 114 U. S. 417; 5 Sup. Ct. Rep. 935; 29 L. ed. 89.



mined condition. In cases arising under State constitutions, inharmonious doctrines have been declared. In some jurisdictions the position has been taken that the guarantees are intended merely for the benefit of the accused and may, therefore, be waived. In other States the courts have held that the guaranty of jury trial in criminal cases is one in which the State also has an interest, and which for that reason may not be waived. In some courts, a third view is taken that the jury is essential to give the court jurisdiction, and that while in case of a plea of guilty, the court may at once pronounce judgment, because there are no facts to be determined, where the plea is not guilty, an issue is raised which only a jury is competent to decide.<sup>19</sup>

In the United States Supreme Court it has been held in *Schick v. United States*<sup>20</sup> that jury trial may be waived in the trial of minor offenses.

The right of the accused to waive jury trial in cases of felony has never come before the Supreme Court; but in *Lewis v. United States*<sup>21</sup> that court held that, in felonies, the presence of the accused could not be waived either by himself or by counsel. The record must show, affirmatively, the presence of the prisoner in court during the trial. It would seem that, in this case at least, the Supreme Court held that a right guaranteed by the Amendments, as distinguished from those in the body of the Constitution, might not be waived.

In the majority opinion in *Hawaii v. Mankichi*<sup>22</sup> the rather surprising statement is made that grand and petit juries in criminal proceedings "are not fundamental in their nature, but concern merely a method of procedure."

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<sup>19</sup> See note in *Columbia Law Review*, VIII, 577.

<sup>20</sup> 195 U. S. 65; 24 Sup. Ct. Rep. 826; 49 L. ed. 99.

<sup>21</sup> 146 U. S. 370; 13 Sup. Ct. Rep. 136; 36 L. ed. 1011.

<sup>22</sup> 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. ed. 1016.

**Speedy trial**

The Sixth Amendment secures to the accused a speedy as well as a public trial.

This provision has received very little discussion in the Federal courts, and so far as the author is aware, no case in which its violation has been asserted has reached the Supreme Court.

**Public trial**

The Constitution expressly provides that criminal trials shall be publicly conducted, and, indeed, it would seem that publicity has been a common-law incident of trials for crime. Many of the State constitutions also expressly provide that proceedings shall be public. In numerous cases, however, it has been held by the State courts that this does not prevent the more or less complete exclusion of spectators where public morals have seemed to require it, and where no prejudice to the accused is thereby occasioned. The question has not been passed upon by the Federal Supreme Court.

**Double jeopardy**

It is provided by a clause of the Fifth Amendment that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

Cases may occur in which the same act may render the actor guilty of two distinct offenses; as, for example, the passing of counterfeit coin of the United States, which may be both an offense against the United States, and, as a fraud on its citizens, an offense against the State. In such cases the accused cannot plead the trial and acquittal, or the conviction and punishment, for one offense in bar to a conviction for the other.<sup>23</sup>

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<sup>23</sup> *Fox v. Ohio*, 5 How. 410; 12 L. ed. 213; *United States v. Mari-*

From this class of acts which constitute two or more distinct offenses, are to be distinguished those acts which are punishable by the tribunals of two or more countries, or by two or more tribunals of the same country. Here the offense is a simple one, but cognizable in two jurisdictions. In such case an acquittal or punishment in one may be pleaded in bar to a prosecution in another court based upon the same act. Thus, in *Grafton v. United States*<sup>24</sup> it was held that one acquitted by a military court of competent jurisdiction could not be tried a second time in a civil court for the same offense.

This doctrine holds even though the punishment which may be inflicted by the court is different from or greater than that which may be imposed by the other; or even if the indictment in the one court charge a different crime from that stated in the other.

What constitutes "jeopardy" is, in accordance with the general principle of constitutional construction, to be determined by the usage of the word and the custom of the common law at the time the Constitution was adopted. By the common law not only was a second punishment for the same offense prohibited but a second trial forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted.<sup>25</sup>

It is not necessary, in order that prior jeopardy may be pleaded in bar, that there should have been a former trial and verdict by a jury. This is not the rule uniformly stated, but as declared in *Kepner v. United States*,<sup>26</sup> "the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy

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gold, 9 How. 560; 13 L. ed. 257; *Moore v. Illinois*, 14 How. 13; 14 L. ed. 306.

<sup>24</sup> 206 U. S. 333; 27 Sup. Ct. Rep. 749; 51 L. ed. 1084.

<sup>25</sup> *Ex parte Lange*, 18 Wall. 163; 21 L. ed. 872.

<sup>26</sup> 195 U. S. 100; 24 Sup. Ct. Rep. 797; 49 L. ed. 114.

when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal."

Where, upon a former trial, the jury has reported disagreement, it appearing reasonably certain that an agreement cannot be obtained, and the jury has been discharged by the court, a plea of former jeopardy will not be held good.<sup>27</sup>

### **Jeopardy and the right of appeal**

It is established that in criminal cases the State has no right of appeal where the accused may fairly be said to have been placed in jeopardy. This, the doctrine of the common law, has been repeatedly accepted by the United States Supreme Court. A verdict or a judgment in a trial court in favor of the accused is, therefore, as to him, final and conclusive. But acquittal before a court without jurisdiction is absolutely void and, therefore, no bar to a subsequent indictment and trial before a court having jurisdiction.<sup>28</sup>

Where, upon conviction, the defendant has taken an appeal, and a new trial has been ordered, he may be found guilty of an offense of a higher degree than that originally found against him. Thus a verdict of manslaughter having been found, and appeal taken, and a new trial awarded, a verdict of murder may be returned.<sup>29</sup>

### **Self-incrimination—Immunity from, not a requirement of due process of law**

By the Fifth Amendment it is provided: "Nor shall any person be compelled, in any criminal case, to be a witness

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<sup>27</sup> *United States v. Perez*, 9 Wh. 579; 6 L. ed. 165.

<sup>28</sup> *United States v. Ball*, 163 U. S. 662; 16 Sup. Ct. Rep. 1192; 41 L. ed. 300.

<sup>29</sup> *Trono v. United States*, 199 U. S. 521; 26 Sup. Ct. Rep. 121; 50 L. ed. 292.

against himself." The guaranty thus furnished is one independent of the guaranty of "due process of law" and is thus one which, so far as the Federal Constitution is concerned, is not secured to the individual in the State courts.<sup>30</sup>

If the answer will tend merely to disgrace but not to incriminate the witness, the privilege does not apply. If, however, the answer is one which can have no bearing on the case except to impair the credibility of the witness, he may refuse to answer.<sup>31</sup>

The immunity which is provided has for its object the protection of the individual against criminal prosecution based upon evidence which has been compulsorily obtained from him. Thus the provision is no bar to the use in a subsequent prosecution of evidence that has been voluntarily given by the accused; nor does it prevent the courts from compelling testimony with reference to acts no longer punishable, or where, by statute, subsequent use of the evidence so obtained in criminal actions has been forbidden. Thus also the immunity does not relate to evidence the tendency of which is merely to discredit the moral character of the witness.<sup>32</sup>

In *Hale v. Henkel*<sup>33</sup> the court declare the broad doctrine that the line is drawn at testimony that may expose the witness to criminal prosecution. "If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon, or is guaranteed an immunity, the amendment does not apply."

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<sup>30</sup> *Twining v. New Jersey*, 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.

<sup>31</sup> *Brown v. Walker*, 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819.

<sup>32</sup> The State courts are in conflict as to this.

<sup>33</sup> 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652.

If the witness waives his privilege, and discloses his criminal connections, he may not stop, but must make a full disclosure of the facts regarding which he is interrogated.<sup>34</sup>

Where the right to compel testimony is based upon a statute granting immunity from subsequent prosecution, the immunity granted must be complete. Absolute protection against later criminal actions for the offense to which the testimony relates must be provided.<sup>35</sup>

The immunity of the individual from compulsory self-incrimination includes the right to refuse to produce private books and papers which will have, or will tend to have, this effect.<sup>36</sup> But it does not permit him, as an officer of a corporation, to refuse to produce its books and papers when the corporation is charged with a violation of a statute by the State of its creation or of the State in which it is doing business, or of an act of Congress.<sup>37</sup>

### Unreasonable searches and seizures

The question as to the right of the government to compel the production of books and papers is closely connected with the provision of the Fourth Amendment with reference to unreasonable searches and seizures. This provision has received comparatively little direct interpretation and application at the hands of the Supreme Court. In *Ex parte Jackson*<sup>38</sup> it was, however, held that it applies

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<sup>34</sup> *Brown v. Walker*, 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819.

<sup>35</sup> *Councilman v. Hitchcock*, 142 U. S. 547; 12 Sup. Ct. Rep. 195; 35 L. ed. 1110.

<sup>36</sup> *Boyd v. United States*, 116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746.

<sup>37</sup> *Hale v. Henkel*, 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652.

<sup>38</sup> 96 U. S. 727; 24 L. ed. 877. See also, generally, *Boyd v. United States*, 116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746.

to sealed matter in the mails. Corporations come within its protection.<sup>39</sup>

### **Cruel and unusual punishments**

The provision of the Eighth Amendment that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" has given rise to few adjudications in the Supreme Court.

The prohibitions are not included within "due process of law," and are not, therefore, made applicable by the Fourteenth Amendment to the States.<sup>40</sup>

The fact that the method of administering the death penalty, for example, by electrocution, is new, does not bring it within the constitutional prohibition, unless it also inflicts what amounts to lingering torture.<sup>41</sup>

In *Weems v. United States*,<sup>42</sup> is given the most careful examination that the Eighth Amendment has received. In this case the very important position is substantially taken by the court that a punishment not cruel and unusual in kind may become such by its severity in amount or degree—the judgment as to this in last instance necessarily devolving upon the court.

### **Treason**

The power of Congress with reference to both the definition and punishment of treason is limited by § III of Art. III of the Constitution. The three clauses of this section provide as follows:

"Treason against the United States shall consist in

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<sup>39</sup> *Hale v. Henkel*, 201 U. S. 43; 26 Sup. Ct. Rep. 370; 50 L. ed. 652.

<sup>40</sup> *Ex parte Kemmler*, 136 U. S. 436; 10 Sup. Ct. Rep. 930; 34 L. ed. 519.

<sup>41</sup> *Idem*.

<sup>42</sup> 217 U. S. 349; 30 Sup. Ct. Rep. 544; 54 L. ed. 793.

levying war against them, in adhering to their enemies, giving them aid and comfort.”

“No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

“The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.”

The purpose of these provisions is to exclude the possibility of the Federal Government, through either its judicial or legislative branches, following the precedents of English law and practice, and declaring a great variety of acts to constitute treason and punishable as such.

Treason is a breach of allegiance. This allegiance may be one of full citizenship, or one based upon the presence of an alien, and the commission of the treasonable act, within the territorial limits of the United States. In an earlier chapter it has been pointed out that an alien within the territorial limits of a State, whether domiciled there or not, owes for the time being a qualified allegiance to that State. He enjoys the protection of its laws, and may be guilty of treason if he wages war against or gives comfort or aid to the enemies of that sovereignty.<sup>43</sup>

The distinction between “high” and “petit” treason is not known to American constitutional law. Or rather, under our law, petit treason no longer exists. It is now simply murder.

Misprision of treason is defined and its punishment provided for by § 5333 of the Revised Statutes. The constitutionality of this provision was considered and not questioned in *United States v. Wiltberger*.<sup>44</sup>

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<sup>43</sup> *Carlisle v. United States*, 16 Wall. 147; 21 L. ed. 426; *Radich v. Hutchins*, 95 U. S. 210; 24 L. ed. 409.

<sup>44</sup> 5 Wh. 76; 5 L. ed. 37.



By the definition of the Constitution treason to the United States may be charged only in cases where the accused has levied war against the United States, adhered to its enemies, or given them aid and comfort; and, for conviction, there must have been an overt act.

The distinction between a mere riot, or resistance to the execution of a law, and treason is not always easy to draw, but in general the authorities hold that resistance to public authority, in order to constitute a levying of war and, therefore, treason, must amount to an effort directly to overthrow the government, or to prevent a law from being executed not simply in a particular instance, but generally.

Thus in *United States v. Mitchell*<sup>45</sup> it was held by a Federal court that an insurrection of armed men, the object of which was to suppress the excise offices and to prevent by force and intimidation the execution of an act of Congress, was a levying of war, and, as such, treason. Upon the other hand, it was held in *United States v. Hoxie* that if the resistance offered to the execution of the law had no public purpose in view, treason was not committed, however great the degree of force employed.

### Treason against a State of the Union

The punishment of the crime of treason against the United States is placed exclusively within the control of the Federal authorities. Treason against an individual State of the Union, however, is punishable by the authorities of the State, which authorities have, subject to the general limitations placed upon them by the Federal Constitution with reference to due process of law, *ex post facto*

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<sup>45</sup> 2 Dall. 348; 1 L. ed. 410. See *Ex parte Bollman*, 4 Cr. 75; 2 L. ed. 554, for a careful consideration of what constitutes war. In this case it is held war must be actually levied if treason is to be found. Mere enlistment for the purpose of carrying on war against the United States is not enough.

legislation, etc., the power to determine what acts shall be held to constitute treason against the State.

### **Offenses, other than treason, against the existence and operation of the Federal Government**

The Federal Government, though restrained by the Constitution with reference to the definition of treason, has the general power to define and punish as it sees fit all acts against its existence or undisturbed operation. Thus it has by statute defined and provided punishment for misprision of treason, inciting or engaging in rebellion or insurrection, criminal correspondence with foreign governments, seditious conspiracy, recruiting soldiers or sailors to serve against the United States, enlistment to serve against the United States, and generally, acts which interfere with the effective operations of the government.

### **Jury trial in civil suits**

By the Seventh Amendment it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

This provision, it has been determined by the Insular Cases, does not apply *ex proprio vigore* to the unincorporated territories.

Trial by jury, as used in this provision, refers to "a jury of twelve men, in the presence of and under the superintendence of a judge empowered to instruct them in the law and to advise them on the facts, and to set aside their verdict if, in his opinion, it is against the law and the evidence." The "rules of common law," refer, of course, to the common law of England, which permits a new trial, granted by the trial court or by an appellate court for errors in law committed on the first trial.

In *Capital Traction Co. v. Hof*<sup>46</sup> it was held that the right to jury is preserved, when an appeal, on giving bond, is allowed from a judgment of a justice of the peace to a court of record, where trial is had by jury. The constitutional provision, it is pointed out, does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it.

The right to a jury trial in civil cases, whatever the value in controversy, may be waived.

### Religious freedom

The provision of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," has given rise to comparatively little litigation in the Federal courts.

In *Reynolds v. United States*<sup>47</sup> the meaning of the prohibition is carefully considered and the conclusion, unavoidable from a practical viewpoint, reached that the prohibition does not prevent Congress from penalizing the commission of acts which, though justified by the tenets of a religious sect, are socially or politically disturbing, or are generally prohibited by the moral sense of civilized communities. Thus, in this case, it was held that polygamy might be declared illegal and criminal, though declared proper and even meritorious by the Mormon Religion.

Under provisions of State constitutions prohibiting the creation of State religious establishments, the appropriation of money for sectarian purposes, and in general the infringement of religious freedom and equality, many

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<sup>46</sup> 174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873.

<sup>47</sup> 98 U. S. 145; 25 L. ed. 244. See also *Davis v. Beason*, 133 U. S. 333; 10 Sup. Ct. Rep. 299; 33 L. ed. 637.

cases have arisen in which American doctrines of Church and State have been discussed. A consideration of these cases will not be appropriate in this treatise, but it may be said that a peculiarly valuable examination of the doctrines governing the attitude of the courts in dealing with property claimed by two or more contesting religious bodies, is that contained in the opinion of the Supreme Court in *Watson v. Jones*.<sup>48</sup>

### **Freedom of speech and press**

The prohibition laid upon Congress by the First Amendment that it shall make no law "abridging the freedom of speech, or of the press" has given rise to very few pronouncements by the Supreme Court, and in no instance, indeed, has the constitutionality of an act of Congress been seriously questioned upon this ground before that tribunal.

In *United States v. Williams*<sup>49</sup> the provision of the Immigration Act of March 3, 1903, for the exclusion of aliens holding anarchistic beliefs was indeed questioned on the ground that freedom of speech and press was infringed, but the court dismissed the point with the observation that while it is true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled therefrom, he is cut off from speaking or publishing in this country, yet the right freely to speak or publish is not infringed, for the one claiming the right "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law." The question thus became simply one of the right to exclude. As to this the court had no doubt in the premises of the power of Congress.

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<sup>48</sup> 13 Wall. 679; 20 L. ed. 666.

<sup>49</sup> 104 U. S. 279; 24 Sup. Ct. Rep. 719; 48 L. ed. 979.

In *Ex parte*<sup>50</sup> Jackson the court after holding that sealed matter in the mails may not be opened and examined, except upon a proper search warrant, go on to observe that as to printed unsealed matter, their transportation in the mails may not be so interfered with as to violate the freedom of the press, because unfettered circulation of printed matter is as essential to the freedom of the press as is the liberty of printing. Therefore, it is declared, if printed matter be excluded from the mails its transportation in other ways may not be forbidden by Congress.

And in *Ex parte* Rapier<sup>51</sup> the court say with reference to the exclusion of lottery tickets, and advertisements thereof, from the mails: "The circulation of newspapers is not prohibited, but the government declines to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communications is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment, through the government agencies which it controls."

The main purpose of the constitutional provisions of the First Amendment has been declared to be "to prevent all such previous restraints upon publications as have been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."<sup>52</sup> In the case in which this doctrine is declared, the court held unfounded the claim of a right under the First Amendment to prove the truth of statements contained in certain publications which had

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<sup>50</sup> 96 U. S. 727; 24 L. ed. 877.

<sup>51</sup> 143 U. S. 110; 12 Sup. Ct. Rep. 374; 36 L. ed. 93.

<sup>52</sup> *Patterson v. Colorado*, 205 U. S. 454; 27 Sup. Ct. Rep. 556; 51 L. ed. 879.

by the lower court been held to constitute contempt of the court.

It would thus appear that the prohibition of the First Amendment relative to the abridgement of freedom of press and speech not only leaves to the Federal courts the authority to grant relief to persons libeled or slandered, and to punish for contempt the publication or utterance of statements reflecting upon its own dignity or calculated to interfere with the proper and efficient administration of justice and the execution of its writs, but that it preserves, or at least does not restrict the power of Congress to declare criminal and provide punishment for the publication or open advocacy of doctrines or practices calculated to destroy or to interfere with the exercise of its constitutional powers.

Thus it would seem beyond question that Congress may define and punish seditious libel, provided the prohibition extends to acts which clearly tend to sedition. The Sedition Act of 1798, never came before the Supreme Court, but was upheld as constitutional by three Federal judges; and the argument by those criticising it, rather was that the act was too broad, than that seditious libel, properly defined, might not be punished.

### **The right peaceably to assemble and petition**

By the First Amendment the right of the people is guaranteed "peaceably to assemble, and to petition the government for redress of grievances." Almost the only discussion by the Supreme Court of this provision is that contained in the opinion in *United States v. Cruikshank*,<sup>53</sup> in which it is held that the right is distinctively a Federal one secured from State restriction.

### **The right to bear arms**

By the Second Amendment it is provided that "a well-

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<sup>53</sup> 92 U. S. 542; 23 L. ed. 588.

regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

### **The quartering of troops**

The provision of the Third Amendment that "no soldier shall in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law," requires little explanation, and has received practically none by the Supreme Court.

### **Slavery and involuntary servitude**

The prohibition of the Thirteenth Amendment is absolute upon both the States and the Federal Government that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

By § 2 of the Amendment Congress is given the power to enforce this provision by appropriate legislation.

It is to be observed that whereas the Fourteenth Amendment has for its aim the protection of citizens against action on the part of the States, and that, therefore, the legislative power of Congress under its enforcement clause is limited to the prevention or punishment of the prohibited acts on the part of the States, the Thirteenth Amendment absolutely prohibits the existence of the institution or fact of slavery or involuntary servitude, and the enforcement clause, therefore, gives to the General Government the power to punish the individual or individuals, whether private persons or State officials who hold, or attempt to hold, anyone in slavery or involuntary servitude.

Pursuant to the power thus given Congress has, by various acts, declared criminal and provided punish-

ment for those persons violating the constitutional provision.<sup>54</sup>

This legislative power of Congress does not, however, extend to the prohibition and punishment of those acts which do not themselves amount to a holding of one in slavery or involuntary servitude, but are acts which infringe the freedom of another. Thus in *Hodges v. United States*<sup>55</sup> was sustained a demurrer to an indictment in a Federal court, on the ground of lack of jurisdiction, which indictment charged the accused with compelling certain negro citizens, by intimidation and force, to desist from performing contracts of employment.

To the argument that one of the *indicia* of slavery is the lack of power to make or perform contracts, and that by the acts of the accused this disability had been brought about and the negroes thus *pro tanto* reduced to a condition of slavery, the court replied that practically every wrong done to another has this result, and to concede the claim of counsel would be to place the punishment of all acts of personal wrong or duress within the power of the Federal Government.

### **Involuntary servitude: Peonage**

The Thirteenth Amendment had, of course, for its chief purpose, the abolition of negro slavery. But this was not the sole purpose. Its terms were purposely made broad enough to exclude not only the slavery of any person, whatever his race or color, but his involuntary servitude save as a punishment for crime. It has thus become necessary

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<sup>54</sup> See Chapter 10, Act of March 4, 1909, codifying, revising and amending the Federal laws of the United States. 35 Stat. at L. 1138. As to the direct legislative power of Congress under the Thirteenth Amendment, see *Clyatt v. United States*, 197 U. S. 207; 25 Sup. Ct. Rep. 429; 49 L. ed. 726. Also, *Civil Rights Cases*, 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835.

<sup>55</sup> 203 U. S. 1; 27 Sup. Ct. Rep. 6; 51 L. ed. 65.



for the courts to pass upon the constitutionality of various forms of compulsory service which, while not amounting to slavery, have been alleged to constitute involuntary servitude or peonage.<sup>56</sup>

The Thirteenth Amendment renders unenforcible contracts for personal services, suits for damages in cases of breaches of such contracts being the only remedy left the ones to whom such services have been promised. A more doubtful question is as to the power of the States or the United States to provide punishment for the breach of contracts for personal services. Various cases have been decided in the State and Federal courts with reference to this point. In general it may be said that the doctrine is established that statutes making criminal the mere breach of contract is void as in violation of the amendment; but that where such breach involves deliberate fraud, as for example, where prepayment for the services has been made and received, the law will be sustained, even though the effort, by intimidation, may be to compel the performance of the promised services.<sup>57</sup>

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<sup>56</sup> In *Slaughter House Cases*, 16 Wall. 36; 21 L. ed. 394, it was held that servitude, though having a broader meaning than slavery, did not include the obligation to resort to a given corporation for the slaughtering of live stock, the obligation being imposed as an exercise of the State's police power. In the *Civil Rights Cases*, 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835, it was held that the denial to a person of admission to inns, theaters, public conveyances, etc., did not amount to involuntary servitude or "tend to fasten upon him any badge of slavery." In *Plessy v. Ferguson*, 163 U. S. 537; 16 Sup. Ct. Rep. 1138; 41 L. ed. 256, a State law requiring separate accommodations for white and colored persons was declared not within the prohibitions of the amendment. In *Robertson v. Baldwin*, 165 U. S. 275; 17 Sup. Ct. Rep. 326; 41 L. ed. 715, certain provisions of Federal law providing for the arrest and return of deserting seamen, was held beyond the prohibitive effect of the Amendment.

<sup>57</sup> See upon this whole subject, *Bailey v. Alabama*, 219 U. S. 219; 31 Sup. Ct. Rep. 145; 55 L. ed. 191.

Equity courts would also undoubtedly feel themselves justified in issuing orders restraining servants from quitting work at a time that will endanger human life or limb, or, indeed, will cause unnecessary or irremediable pecuniary loss to the employer. Thus, for example, the train hands of a railway company might be forbidden to leave their employment before bringing their train to its destination, or at least to some station where additional hands might be obtained to operate the train.<sup>58</sup>

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<sup>58</sup> Freund, *Police Power*, §§ 333, 452. Also, *Toledo, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730; *Arthur v. Oakes*, 63 Fed. Rep. 310.

## CHAPTER XXXVI

### DUE PROCESS OF LAW

#### **Due process of law: Definition of**

By the Fifth Amendment the prohibition is laid upon the Federal Government that "no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." By the Fourteenth Amendment a similar prohibition with reference to the deprivation of life, liberty or property is laid upon the States.

In almost every chapter of this treatise it has been necessary to discuss the meaning of these prohibitions with reference to the exercise of specific powers by the Federal or State governments. In the present chapter, therefore, the attempt will be made to determine simply the general intent and scope of the phrase "due process of law."

No complete and rigid definition of due process of law has been given by the Supreme Court. Indeed, it is questionable whether it is possible to give one. "Few phrases in the law are so elusive of exact apprehension as this," the court declare in the recent case of *Twining v. New Jersey*,<sup>1</sup> and add: "This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise."

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<sup>1</sup> 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.

In *Hagar v. Reclamation District*<sup>2</sup> it is said: "It is sufficient to say that by due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law, it must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause, therefore, means that there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights." Due process of law thus requires the adjudicating court to have jurisdiction of both the parties and the subject-matter;<sup>3</sup> and that "the laws shall operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."<sup>4</sup> "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law."<sup>5</sup>

In large measure, the specific contents of the phrase "due process of law" are to be ascertained by "an examination of those settled usages and modes of proceedings existing in the common and statute law of England before

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<sup>2</sup> 111 U. S. 701; 4 Sup. Ct. Rep. 663; 28 L. ed. 569.

<sup>3</sup> *Pennoyer v. Neff*, 95 U. S. 714; 24 L. ed. 565.

<sup>4</sup> *Giozza v. Tiernan*, 148 U. S. 657; 13 Sup. Ct. Rep. 721; 37 L. ed. 599.

<sup>5</sup> *Mo. Pacific Ry. Co. v. Humes*, 115 U. S. 512; 6 Sup. Ct. Rep. 110; 29 L. ed. 463.

the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement in this country." But this historical method of determining the meaning of the phrase is not to be exclusively resorted to, or when resorted to, the court to be concluded thereby. That is to say, the fact that a given procedure is not to be found accepted in English and prior American practice is not to be held as conclusively determining it not to be due process of law. If the procedure under examination can be shown to preserve the fundamental characteristics and to provide the necessary protection to the individual, which the Constitution was intended to secure, its novelty will not vitiate it.<sup>6</sup>

Thus it has been held that, so long as the fundamental rights of litigants to a fair trial, as regards notice, opportunity to present evidence, etc., and adequate relief are provided, the specific requirements of the Constitution are not violated. Congress has, as to these matters, a full discretion as to the form of the trial or adjudication, and the character of the remedy to be furnished. Furthermore, the States not being bound by the Fifth, Sixth and Seventh Amendments, grand and petit juries may be dispensed with by them. So also, within limits, legislatures may determine what evidence shall be received, and the effect of that evidence, so long as the fundamental rights of the parties are preserved.<sup>7</sup>

No person has a vested right to a particular remedy. "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the quali-

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<sup>6</sup> *Hurtado v. California*, 110 U. S. 516; 4 Sup. Ct. Rep. 111; 28 L. ed. 232.

<sup>7</sup> *Fong Yue Ting v. United States*, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905, and authorities there cited. See also *Adams v. New York*, 192 U. S. 585; 24 Sup. Ct. Rep. 372; 48 L. ed. 575.

fication that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.”<sup>8</sup> Statutes of limitations, if reasonable, are not unconstitutional as a denial of property or contractual rights. The authorities as to this are so uniform and numerous as not to need citation.

Due process of law does not require the provision of a right of appeal from a trial to a superior court;<sup>9</sup> nor is the exemption of one accused of crime from self-incrimination.<sup>10</sup>

It is not essential to due process of law that in criminal cases the accused shall be confronted at the time of trial with the witnesses against him. This is specifically required by the Sixth Amendment in the Federal Courts, but in *West v. Louisiana*<sup>11</sup> it is held that the Fourteenth Amendment does not lay this obligation upon the States.

It is not essential to due process of law that proceedings and adjudications, though admittedly of a judicial nature, shall be had in courts of law. It not infrequently happens that administrative boards or officers in the discharge of their duties are compelled to consider and decide upon matters of a judicial character, and, provided an adequate opportunity is offered to the parties to appear and defend, due process of law is not denied by making the administrative determinations they reach conclusive and not open to further consideration in the courts, except, of course, as to the matter of the jurisdiction of the officers or boards

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<sup>8</sup> *Brown v. New Jersey*, 175 U. S. 172; 20 Sup. Ct. Rep. 77; 44 L. ed. 119.

<sup>9</sup> *McKane v. Durston*, 153 U. S. 684; 14 Sup. Ct. Rep. 913; 38 L. ed. 867; *Pittsburgh Ry. Co. v. Backus*, 154 U. S. 421; 14 Sup. Ct. Rep. 1114; 38 L. ed. 1031; *Reetz v. Michigan*, 188 U. S. 505; 23 Sup. Ct. Rep. 390; 47 L. ed. 563.

<sup>10</sup> *Twining v. New Jersey*, 211 U. S. 78; 29 Sup. Ct. Rep. 14; 53 L. ed. 97.

<sup>11</sup> 194 U.S. 258; 24 Sup. Ct. Rep. 650; 48 L. ed. 965.

in question, or as to whether adequate notice and opportunity to defend has been given the parties affected. In short, "due process is not necessarily judicial process."<sup>12</sup> This subject is more fully discussed in a later chapter of this treatise.

The mere failure to comply with certain formalities prescribed by a State law is not, without reference to what those formalities are, a denial of due process. "When, then, a State court has decided that a particular formality is or is not essential under a State statute, such decision presents no Federal question, providing always that the Statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the State interpretation of its own law is controlling and decisive."

So also it has been held that due process of law does not protect the individual who, in obedience to an interpretation given by executive officers to a statute, takes action which is later held by the courts to be unwarranted by that statute.

### **Due process and substantive rights**

In the discussion thus far had as to the meaning of due process, only its procedural or adjective side has been emphasized. We turn now to examine in how far substantial rights are secured to the individual by the process clauses.

It is quite plain that the phrase due process of law is historically related to and derived from the phrase "*per legem terrae*" of *Magna Carta*, and that the provisions of

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<sup>12</sup> Reetz v. Michigan, 188 U. S. 505; 23 Sup. Ct. Rep. 390; 47 L. ed. 563. See also Davidson v. New Orleans, 96 U. S. 97; 24 L. ed. 616; Murray's Lessee v. Hoboken Land Co., 18 How. 272; 15 L. ed. 372.

that fundamental document were intended, and have since been treated as a limitation not upon the legislature but upon the executive and upon the courts. The provision *per legem terræ* thus means in the English law that the individual shall not be deprived of his life, liberty or property by arbitrary acts, unsupported by existing law, whether common or statutory, by the King or his courts. But that the law is subject to change at the will of Parliament is not and has not been doubted. The property rights of the individual were thus at the time of the adoption of our Constitution, and have since remained, subject to the plenary legislative power of Parliament. There is thus some historical ground for holding that, in the absence of explicit provision to the contrary, the due process clauses of the Federal Constitution were not intended as a restraint, the one upon Congress, and the other upon the State legislatures.

Upon the other hand, however, the general purpose of written constitutions in the United States, if not originally in all cases, has come to be quite different from that of the *Magna Carta*. In this country our written instruments of government and their accompanying Bills of Rights have for their aim the delimitation of the powers of all the departments of government, the legislative as well as the executive and the judicial, and it is therefore, quite proper to hold that the requirements of due process of law should not only prohibit executive and judicial officers from proceeding against the individual, except in conformity with the procedural requirements which have been mentioned in the earlier part of the chapter, but also operate to nullify legislative acts which provide for the taking of private property without compensation, or life or liberty without cause, or, in general, for executive or judicial action against the individual of an arbitrary or clearly unjust and oppressive character.



In 1869, in *Hepburn v. Griswold*,<sup>13</sup> the Supreme Court took definitely the view that Congress was restrained by the due process clause of the Fifth Amendment.

With reference to the inhibitions of the Fourteenth Amendment there was never any doubt that they restrained the legislative power of the States.<sup>14</sup> In *C., B. & Q. Ry. Co. v. Chicago*<sup>15</sup> the court say in language leaving no room for doubt: "In our opinion, a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment."

When, however, the complaint is merely that a State court has erroneously decided the facts of a case, all of the proceedings before it being regular and sufficient no claim of a denial of due process can be set up.<sup>16</sup>

It being established, then, that the substantive rights of the individual are protected by the due process of law clauses, it becomes necessary to consider what these rights of life, liberty, and property are.

### Life

The right of life requires no definition.

### Liberty

Liberty and property are terms which have each received definitions broad enough to cause their connotations in very considerable measure to overlap. Thus in *Allgeyer v. Louisiana*<sup>17</sup> the court, defining liberty, say:

<sup>13</sup> 8 Wall. 603; 19 L. ed. 513.

<sup>14</sup> *Ex parte Virginia*, 100 U. S. 339; 25 L. ed. 676; *Hurtado v. California*, 110 U. S. 516; 4 Sup. Ct. Rep. 111; 28 L. ed. 232.

<sup>15</sup> 166 U. S. 226; 17 Sup. Ct. Rep. 581; 41 L. ed. 979.

<sup>16</sup> *Central Land Co. v. Laidley*, 159 U. S. 103; 16 Sup. Ct. Rep. 80; 40 L. ed. 91.

<sup>17</sup> 165 U. S. 578; 17 Sup. Ct. Rep. 427; 41 L. ed. 832.

“The liberty mentioned in the Fourteenth Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all of his faculties; to be free to use them in all lawful ways; to live and to work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”

With this definition of liberty may be compared the following definition, by the Supreme Court of Illinois, of property: “The right of property preserved by the Constitution,” say the court, “is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And as an incident to the right to acquire other property, the liberty to enter into contracts by which labor shall be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.”<sup>18</sup>

The foregoing definitions make it sufficiently plain that contractual rights, as a species of property rights, or as included within the definition of liberty, are fully protected by the due process clauses. In *Holden v. Hardy* there is an explicit statement to this effect.

The manner in which the rights of property and of

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<sup>18</sup> *Braceville Coal Co. v. People*, 147 Ill. 66. Quoted by McGehee, *Due Process of Law*, 141.

liberty, including liberty of contract, are held subject to the exercise of such powers of the State as those of eminent domain, taxation, the regulations of occupations affected with a public interest, is considered *passim* throughout this treatise, and does not require specific treatment in this place. A special word with reference to the police powers is, however, needed.

### **Police power defined**

One of the classic definitions of the police power is that of Chief Justice Shaw, given in his opinion in *Commonwealth v. Alger*. He says: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, not injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and such reasonable restraints, and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and

reasonable laws, statutes, and ordinances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise."

In the police power of the State, which it has been held, is a right which State may not part with even by express contract, we thus have a general right upon the part of the public authority to abridge or destroy, without compensation, the property or contract rights of individuals and to control their conduct in so far as this may be necessary for the protection of the community against danger in any form, against fraud, vice, or economic oppression, or even for the securing of public convenience. In *Noble State Bank v. Haskell*,<sup>19</sup> the court declare: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The police power is not, however, without limits, or otherwise the prohibition as to taking of life, liberty or property without due process of law would be wholly shorn of its restraining force. It always lies within the power of the courts to hold void a law which, though enacted as a police measure, is not, in the opinion of the court, justified as such, and is therefore a taking of property or an abridgement of freedom without the process of law. Thus, in *Lochner v. New York*,<sup>20</sup> the court in holding void a State law regulating the number of hours that adult laborers might be employed in bake shops,

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<sup>19</sup> 219 U. S. 575; 31 Sup. Ct. Rep. 186; 55 L. ed. 341.

<sup>20</sup> 198 U. S. 45; 25 Sup. Ct. Rep. 539; 49 L. ed. 937.

declared: "There is no reasonable ground for interfering with the liberty of person or the right of full control by determining the hours of labor in the occupation of a baker. . . . The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

In general it may be said that while, by a legitimate exercise of the police power, the conduct of individuals and the use by them of their property may be regulated, or, in some cases, their property even destroyed, as for example, when a building is torn down to prevent the spread of a conflagration, the State is never justified in a direct taking of property for its own use, nor in ordering the transfer of property from one individual to another person. In *Noble State Bank v. Haskell*, Justice Holmes did, indeed, say that "an ulterior public advantage may justify a comparatively insignificant taking of private property for what is, in immediate purpose, a private use," but, on motion for rehearing he took care to say he had not intended to give a new or wider scope to the police power, for that, in fact, in the case at hand, there had been no unconditional taking at all. The cases cited, he said, were to establish, "not that property might be taken for a private use, but that, among the public uses for which it might be taken, were, some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private."

### **Equal protection of the laws**

The United States is not expressly forbidden by the

Constitution to deny to anyone the equal protection of the laws, as are the States by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to "due process of law" has received is sufficient to cover very many of the acts which, if committed by the States, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law as far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws "operate on all alike, and so not subject the individual to an arbitrary exercise of the powers of government."

In *Smyth v. Ames*<sup>21</sup> the authorities are reviewed, and from them the general conclusion drawn that a State law "establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all circumstances is just to it and to the public, would deprive such carrier of his property without due process of law, and deny to it the equal protection of the laws." Throughout this case, indeed, the requirement of due process of law is treated as necessarily including equal protection within its scope.

### **Obligations of contracts**

No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. That government is, however, forbidden by the Fifth Amendment to deprive persons of property without due process of law or to

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<sup>21</sup> 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.

take private property for a public use without just compensation. In so far, then, as contract rights may be treated as property they are protected from direct impairment by Federal action. This was definitely declared, as we have earlier seen in the first legal tender decision of *Hepburn v. Griswold*.<sup>22</sup>

Contracts are not, however, protected from any indirect impairment of their obligation when this incidentally results from the exercise by Congress of a legislative power constitutionally given it. Thus in *Knox v. Lee*,<sup>23</sup> with reference to the due process of law requirement of the Fifth Amendment, the court say: "That provision has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has not been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft or a war, may inevitably bring upon individuals great losses, may indeed render valuable property almost valueless. They may destroy the worth of contracts."

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<sup>22</sup> 8 Wall. 603; 19 L. ed. 513.

<sup>23</sup> 12 Wall. 457; 20 L. ed. 287. See, also, *Sinking Fund Cases*, 99 U. S. 700; 25 L. ed. 496.

## CHAPTER XXXVII

### PROHIBITIONS LAID UPON THE STATES

The prohibitions upon State action imposed by the Federal Constitution are of two kinds: (1) those that arise from the fact that their exercise would be inconsistent with the powers possessed by the Federal Government; and (2) those specifically laid down in the Federal Constitution. These limitations upon the powers of the States incidental to the general nature of the Federal Government and to the powers possessed by it are treated in their appropriate places in this treatise. In this chapter there will be considered the express limitations upon the States as enumerated in the Constitution. These are found in § X of Art. I, and in the Thirteenth, Fourteenth, and Fifteenth Amendments.

Various other clauses of the Constitution, as, for example, §§ I, II, and IV of Art. IV and Art. VI, by imposing specific obligations upon the States may be said to create corresponding limitations, but these are elsewhere considered in this work.

That the prohibitions of the first eight amendments, like those contained in § IX of Art. I of the Constitution relate exclusively to the Federal Government, and place no restrictions upon State actions has been uniformly held since the first declaration of the principle in *Barron v. Baltimore*.<sup>1</sup> That the adoption of the Fourteenth did not operate to alter this doctrine has been pointed out

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<sup>1</sup> 7 Pet. 243; 8 L. ed. 672.



in this treatise.<sup>2</sup> The specific prohibitions laid upon the States with reference to slavery and involuntary servitude, due process of law, and the equal protection of the laws, have been considered in the preceding chapter.

### **Bills of credit**

The first clause of § X of Art. I of the Constitution declares that "no State shall . . . . emit bills of credit; [or] make anything but gold and silver coin a tender in payment of debts."

In *Craig v. Missouri*,<sup>3</sup> decided in 1830, the Supreme Court was for the first time called upon to determine squarely what constitutes a "bill of credit;" within the meaning of the constitutional prohibition. In this case was questioned the power of the State to issue certain interest bearing certificates, not declared legal tender, but receivable at the treasury or any of the loan offices of the State in discharge of taxes or payment of debts due to the State. Certain property of the State was pledged to their redemption, and the governor was authorized to negotiate a loan of silver or gold for the same purpose. These certificates, it was provided, might be loaned to citizens of the State upon real estate or personal security. These certificates, the Supreme Court held, Justices Thompson, M'Lean and Johnson dissenting, to be bills of credit, and as such illegally emitted. In his opinion Marshall says: "To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day."

Having adverted to the characteristics of the certificates in question, their denominations,—from ten dollars to fifty cents—their receivability for taxes, etc., as indicat-

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<sup>2</sup> P. 71.

<sup>3</sup> 4 Pet. 410; 7 L. ed. 903.

ing conclusively that they were intended and fitted for circulation as currency, the court overrules the contention that they were not to be deemed bills of credit in the constitutional sense because not made legal tender. "The Constitution itself" it is declared "furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description."

In the case of *Briscoe v. Bank of Kentucky* <sup>4</sup> was questioned the power of the State to charter a bank, of which the State was the sole stockholder, with the power of issuing notes payable to bearer on demand designed to circulate as money. The case was first argued just before the death of Chief Justice Marshall, and the issue of these notes by the bank was held to be, in effect, the issuance of bills of credit by the State itself. A rehearing being granted, however, and the case coming on for argument before the court presided over by Taney, the previous decision was reversed, and the notes held to be constitutionally issued. Justice M'Lean delivered the opinion of the court saying: "To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life. The individuals or committee who issue the bill must have the power to bind the State; they must act as agents, and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a State cannot emit."

Continuing, the court deny that the notes of the bank were issued by the State, or that they contained a pledge

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<sup>4</sup> 11 Pet. 257; 9 L. ed. 709.

of the credit of the State. The fact that the State was the exclusive stockholder of the bank was held immaterial.

In *Darrington v. Bank of Alabama*<sup>5</sup> the doctrine of the *Briscoe* case was reaffirmed. In this case the State was not only the sole stockholder of the bank but had pledged its credit for the ultimate redemption of the notes. This, however, it was held, did not operate to transform the notes into state-emitted bills of credit for the reason that the bank had corporate property of its own which was primarily liable and sufficient for the payment of the notes.

In the Virginia coupon case of *Poindexter v. Greenhow*<sup>6</sup> the court held that interest coupons cut from bonds issued by the State and made receivable by the State in payment of taxes due it, were not bills of credit. Though promises to pay money, and the credit of the State pledged therefor, and receivable by the State for taxes, the coupons were not issued or emitted as a circulating medium or paper currency.

In *Houston etc. Ry. Co. v. Texas*<sup>7</sup> a warrant drawn by State authorities in payment of an appropriation made by the legislature for a debt due by the State and payable upon presentation if there should be any funds in the treasury, was held to be not a bill of credit within the meaning of the constitutional prohibition.

### **Ex post facto legislation**

By § X, Clause I of Art. I, the States are forbidden to pass any *ex post facto* law. The same prohibition is laid upon the Federal legislature by the third clause of § IX, and the force of this prohibition has been sufficiently considered in the preceding chapter.

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<sup>5</sup> 13 How. 12; 14 L. ed. 30.

<sup>6</sup> 114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185.

<sup>7</sup> 177 U. S. 66; 20 Sup. Ct. Rep. 545; 44 L. ed. 673.

**Equal protection of the law**

As in the case of due process of law, the requirement of the Fourteenth Amendment as to the equal protection of the law receives specific incidental consideration, throughout this treatise. It is, therefore, not necessary here to more than state the general meaning of the term.

Shortly stated, the requirement is not that all persons (including corporations) shall be treated exactly alike, but that where a distinction is made there shall be a reasonable ground therefor—one based on administrative or political necessity or convenience, or on economic needs. Thus in the exercise of the States' power of taxation or of police, or of the other powers, classifications of the persons or properties to be affected may be made. But, when such classifications are made, the laws must operate uniformly upon all the members of each class. This subject is elsewhere particularly discussed in connection with the law of inheritance taxes and special assessments.<sup>8</sup>

Corporations equally with natural persons are entitled to the protection of the clause.<sup>9</sup>

But it is to be observed that as to foreign corporations, a State having the constitutional right to say whether a corporation not chartered by itself shall do business within its limits (interstate commerce excepted) the State may impose upon such corporations as conditions precedent to the enjoyment of the privilege, such special conditions as it may see fit.

Perhaps the best general statement of the scope and intent of the provision for the equal protection of the laws is that given by Justice Field in his opinion in *Barbier v. Connolly*,<sup>10</sup> in which, speaking for the court, he says:

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<sup>8</sup> P. 384.

<sup>9</sup> *Pembina Silver Mining Co. v. Pennsylvania*, 125 U. S. 181; 8 Sup. Ct. Rep. 737; 31 L. ed. 650.

<sup>10</sup> 113 U. S. 27; 5 Sup. Ct. Rep. 357; 28 L. ed. 923.

“The Fourteenth Amendment in declaring that no State ‘shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,’ undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, and the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon the one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed the ‘police power,’ to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.”

#### **Illustrative cases arising under the equal protection clause**

The enumeration of some of the specific applications which the requirement of equal protection of the laws has received will sufficiently illustrate its scope and intent.

The provision of the Fourteenth Amendment guarantees to individuals and to corporations that they shall not by

State law be excluded from the enjoyment of privileges which other persons and corporations similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from. But no one is guaranteed that, in fact, through the fortuitous operation of a law, which in itself is not discriminative, a special burden may not be imposed, or the enjoyment of a privilege taken away. Thus for example, in *Strauder v. West Virginia*<sup>11</sup> a State law was held invalid which denied to members of the colored race the right to act upon juries, the court saying, "the law in the State shall be the same for the black as for the white; and all persons whether colored or white, shall stand equal before the laws of the State." But in *Virginia v. Rives*<sup>12</sup> and other cases it is held that the fact that it happens that no negroes are in fact drawn upon juries, or *vice versa*, that no whites are so drawn, is not constitutionally objectionable, unless it affirmatively appear that the State officials intrusted with the administration of the law arbitrarily and with intent have given an unequal and discriminative effect to the law.

The case of *Yick Wo v. Hopkins*<sup>13</sup> involved the validity of an ordinance of the city of San Francisco which required all persons desiring to establish laundries in frame houses to obtain the consent of certain municipal officials. Here the law or ordinance was not upon its face discriminatory, but it was held void for the reason that it gave to the designated officials, "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons," and because the evidence

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<sup>11</sup> 100 U. S. 303; 25 L. ed. 664.

<sup>12</sup> 100 U. S. 313; 25 L. ed. 667. See, also, *Gibson v. Mississippi*, 162 U. S. 565; 16 Sup. Ct. Rep. 904; 40 L. ed. 1075.

<sup>13</sup> 118 U. S. 356; 6 Sup. Ct. Rep. 1064; 30 L. ed. 220.

showed in fact "an administration directed so exclusively against a particular class of persons (the Chinese) as to warrant and require the conclusion that whatever may have been the intent of the ordinances so adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the law which is secured to the petitioners as to all other persons by the broad and benign provisions of the Fourteenth Amendment." The court then go on to declare the general doctrine: "Though the law be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The requirement as to the equal protection of the law does not operate to prevent the States from restricting the enjoyment of political privileges to such classes of their citizens as they may see fit.

### Classifications

When there are reasonable economic or political or social reasons for doing so, certain occupations or industries, or even classes of persons may be selected out for special regulation or for the enjoyment of special privileges.

Thus, for example, the practice of certain professions may be limited to persons of the male sex, or to those of a certain age, or to those possessing other qualifications that may reasonably be held to indicate a fitness for the profession.<sup>14</sup>

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<sup>14</sup> *In re Lockwood*, 154 U. S. 116; 14 Sup. Ct. Rep. 1082; 38 L. ed. 929.

Thus also, as proper police measures, the States are permitted to impose special restrictions and liabilities upon railway corporations. Special modifications of the common-law doctrine of employers' liability with reference to them have been upheld, as have laws placing the presumption of negligence upon them when cattle have been killed by their trains, and laws making them responsible for fires kindled by sparks from their locomotives, though they may have taken every possible precaution to avoid such fires.<sup>15</sup>

However, in *Gulf, etc., Ry. Co. v. Ellis*<sup>16</sup> a State law was held void which imposed an attorney's fee in addition to costs upon railway companies which should fail to pay certain claims within a certain time after presentation. Here the court held that there was no reasonable relation between the burden imposed and the peculiar character of the business done.

In *Missouri v. Lewis*<sup>17</sup> the important principle was laid down that the equal protection clause of the Fourteenth Amendment does not prevent the application by a State of different laws and different systems of judicature, to its various local subdivisions.

### **Equal protection requires similar but not the same privileges**

Where similar or substantially similar conveniences and

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<sup>15</sup> *St. Louis, etc., Co. v. Mathews*, 165 U. S. 1; 17 Sup. Ct. Rep. 243; 41 L. ed. 611; *Mo. Pacific Ry. Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. ed. 107.

<sup>16</sup> 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. ed. 666. See, also, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; 22 Sup. Ct. Rep. 431; 46 L. ed. 679; *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283; 18 Sup. Ct. Rep. 594; 42 L. ed. 1037. As to classifications of property for purposes of taxation, see *Bell's Gap, etc., v. Pennsylvania*, 134 U. S. 232; 10 Sup. Ct. Rep. 533; 33 L. ed. 892; *Plumber v. Coler*, 178 U. S. 115; 20 Sup. Ct. Rep. 829; 44 L. ed. 998.

<sup>17</sup> 101 U. S. 22; 25 L. ed. 989.



comforts are offered, transportation companies, inns, theatres, and other public service companies may by law be permitted or required to provide separate accommodations to the different races, colored, Mongolian or white.

In *Plessy v. Ferguson*<sup>18</sup> the court say: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law; and in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, or even requiring their separation where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of State legislatures in the exercise of their police powers. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the police power; even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

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<sup>18</sup> 163 U. S. 537; 16 Sup. Ct. Rep. 1138; 41 L. ed. 256.

## CHAPTER XXXVIII

### THE OBLIGATION OF CONTRACTS

#### **The obligation of contract clause**

In addition to being prohibited by the Fourteenth Amendment from depriving any person of life, liberty or property, without due process of law, the States are, by § X, Art. I of the Constitution, expressly denied the power to pass any law impairing the obligation of contracts. This provision, the general intent of which is sufficiently plain, has in its application given rise to a multitude of cases requiring adjudication in the courts. The purpose of this treatise will not require us, however, to examine these cases in detail. Elsewhere in this treatise, certain specific applications of the prohibition are considered.<sup>1</sup> In this chapter the aim will be, as it was the aim in the chapter dealing with due process of law, to ascertain the broad and underlying principles which have governed the Federal courts in the enforcement of the prohibition.

As has been already seen, the due process of law clause of the Fourteenth Amendment protects the individual in his right to enter into contracts not contrary to public policy. The provision under consideration protects from impairment the obligation of the contract when entered into.

So far as this provision is concerned, a State law divesting vested rights is not invalid, unless these rights are

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<sup>1</sup> Chapter XLV, Suits Against the States.

founded upon contracts, and the effect of the law is thus to impair or nullify their force.<sup>2</sup>

The obligation of a contract is not impaired by a law which changes the legal or equitable means for its enforcement, existing at the time it was entered into, provided an adequate though not so convenient a remedy is retained or substituted therefor. The principle in this effect is thus similar to that discussed in connection with the due process of law clause.

Laws which operate to remedy or cure technical defects so as to give validity to otherwise invalid contracts are constitutional, their effect being to confirm rather than to impair the obligation of contracts.<sup>3</sup>

Elsewhere in this treatise it is pointed out that, to a certain extent, the States' right of taxation may, in return for a substantial consideration, be parted with. When thus parted with, the undertaking not to exercise the right in the manner specified constitutes a contract, the obligation of which is impaired by a subsequent law authorizing its exercise. The clause thus operates as a limitation upon the taxing power of the States. As to the police power of the State, as will be presently shown, the rule is otherwise. No State, it has been held, may validly contract not to exercise in the future a power which is necessary to the health, safety, comfort or morality of its citizens.

The contracts, the obligation of which is secured from impairment by the States, include agreements between the States and between a State and an individual or individuals, as well as those between individuals. In other words, the State when contracting does so upon the same terms as a private individual or corporation, and may not plead

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<sup>2</sup> *Satterlee v. Matthewson*, 2 Pet. 380; 7 L. ed. 458; *Bronson v. Kinzie*, 1 How. 311; 11 L. ed. 143.

<sup>3</sup> *Watson v. Mercer*, 8 Pet. 88; 8 L. ed. 876.

its sovereignty as justifying subsequent action upon its part impairing the contractual obligations which it has assumed. Its non-amenability to suit may, however, enable a State to avoid the performance of an agreement which it has undertaken to perform. This branch of the subject is more fully discussed in the chapter of this treatise dealing with the suability of the State.

### **What constitutes a contract**

Election or appointment to a public office does not create a contract between the State and the one so appointed.<sup>4</sup>

Marriage, though in some respects properly describable as a contract, is not a contract in the sense that its obligation is protected from impairment by the State.<sup>5</sup>

A license granted by a State, or by one of its political sub-divisions, is not a contract within the meaning of the prohibition. It is nothing more than the grant of a privilege which, so far as the Federal prohibition regarding the impairment of the obligation of contracts is concerned, may be revoked at any time at the will of the grantor, or its continued enjoyment made dependent upon new and more onerous conditions. This principle is so well settled that a citation of authorities is scarcely needed. The only difficulty lies in determining in specific cases whether the grant of authority by the State is in the nature of a license or of a franchise, which is to be construed as a contract. However, the presumption is always against the existence of a contract. "A contract binding the State is only created by clear language and not to be extended by implication beyond the terms of the statute."<sup>6</sup>

Generally speaking, the right of a foreign corporation

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<sup>4</sup> *Butler v. Pennsylvania*, 10 How. 402; 13 L. ed. 472.

<sup>5</sup> *Maynard v. Hill*, 125 U. S. 190; 8 Sup. Ct. Rep. 723; 31 L. ed. 654.

<sup>6</sup> *Williams v. Wingo*, 177 U. S. 601; 20 Sup. Ct. Rep. 793; 44 L. ed. 905.

to do business within a State is in the nature of a license which the State may revoke or modify at discretion. Where, however, the foreign corporation, relying upon an existing law to the effect that certain charges will not, for a certain period at least, be imposed upon it, has entered the State for the transaction of business there, a contract to that effect is held to exist between it and the State, the obligation of which the latter may not impair.<sup>7</sup>

### Charters of public corporations

The charters of public corporations, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the obligation clause, and, so far as the Federal Constitution is concerned, the State legislature has, with reference to them, unlimited powers of amendment or repeal.<sup>8</sup>

Where, however, municipalities or other subordinate political corporations have, in the exercise of their charter powers, entered into contracts, those contracts are protected from subsequent impairment by State law.<sup>9</sup> Any law which withdraws or limits the remedies for the enforcement of such municipal contracts is void.<sup>10</sup>

Generally speaking, also, franchises granted by municipal corporations, if authorized by their charters, are contracts which, under the authority of the Dartmouth College case, presently to be considered, are protected against impairment.

So, also, a State law limiting the powers of taxation of a municipal corporation, whereby its ability to pay its debts

<sup>7</sup> *Am. Smelting Co. v. Colorado*, 204 U. S. 103; 27 Sup. Ct. Rep. 198; 51 L. ed. 393.

<sup>8</sup> *Laramie Co. v. Albany Co.*, 92 U. S. 307; 23 L. ed. 552.

<sup>9</sup> *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79; 12 Sup. Ct. Rep. 142; 35 L. ed. 943.

<sup>10</sup> *Mobile v. Watson*, 116 U. S. 289; 6 Sup. Ct. Rep. 398; 29 L. ed. 620.

is materially lessened, is void as to debts created prior thereto, the creditors relying upon the taxing powers of the corporation to provide the funds for the payment of their claims.<sup>11</sup>

So, also, generally, it is held to be an impairment of the obligation of contracts entered into by municipal corporations to deprive them by subsequent State legislation of any authority whatsoever whereby they may be rendered less able to perform their agreements, or whereby the enforcement by creditors of their claims against them is rendered more difficult or less certain.

### **Charters of private corporations are contracts: The Dartmouth College case**

In 1819 in the Dartmouth College case<sup>12</sup> a charter of a private corporation was held to be a contract between the State granting it and the corporation, which the former might not impair by subsequent legislation. Prior to this decision it had been held in *Fletcher v. Peck*,<sup>13</sup> decided in 1810, that the obligation clause applied to executed as well as to executory contracts, and to contracts entered into by the States as well as to those entered into by private individuals.

This fundamental doctrine that the charter of a private corporation is a contract which, under the obligation clause, a State may not impair by legislation, though it has been much criticized, has never been departed from by the Supreme Court. In practical operation, however, its force has been much weakened not only by a very general practice upon the parts of the States, when granting

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<sup>11</sup> *Wolff v. New Orleans*, 103 U. S. 358; 26 L. ed. 395; *Seibert v. Lewis*, 122 U. S. 284; 7 Sup. Ct. Rep. 1190; 30 L. ed. 1161; *Louisiana v. New Orleans*, 215 U. S. 170, 30 Sup. Ct. Rep. 40; 54 L. ed. 144.

<sup>12</sup> *Dartmouth College v. Woodward*, 4 Wh. 518; 4 L. ed. 629.

<sup>13</sup> 6 Cr. 87; 3 L. ed. 162.

charters, to reserve the right to amend or revoke them, but by later decisions of the courts with reference to the strictness with which the contractual elements of corporate charters are construed, and to the power of the States in the exercise of their police powers, their power of eminent domain, and their authority to control public service corporations, or corporate concerns affected with a public interest, to disregard even those charter rights which a strict construction shows to have been granted.

### **Charter grants strictly construed**

With reference to the strictness with which charter grants are to be construed the courts have laid down the doctrine that the State is to be held to have granted only such powers or immunities as are specifically or unequivocally stated, or as are necessarily or unavoidably implied therein. In *Northwestern Fertilizing Co. v. Hyde Park*<sup>14</sup> the court say: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim."<sup>15</sup>

### **The police power and the obligation of contracts**

The extent of the power of the States in the exercise of their police powers to control the operations of domestic

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<sup>14</sup> 97 U. S. 659; 24 L. ed. 1036.

<sup>15</sup> See also *Charles River Bridge Co. v. Warren Bridge Co.*, 11 Pet. 420; 9 L. ed. 773; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22; 26 Sup. Ct. Rep. 224; 50 L. ed. 353. As to the power of the States to bind themselves by charter contracts with reference to the regulation of the rates to be charged by public service corporations, see *Railway Commission Cases*, 116 U. S. 307; 6 Sup. Ct. Rep. 334; 29 L. ed. 636.

corporations as well as the strictness with which the charter grants are to be construed, is exhibited in the cases of the *Northwestern Fertilizing Co. v. Hyde Park*,<sup>16</sup> decided in 1878, and of *Stone v. Mississippi*,<sup>17</sup> decided in 1880, the court, in the latter case saying: "The question is, therefore, directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require . . . . The contracts which the Constitution protects are those which relate to property rights, not governmental."

### **Tax exemptions**

Arguing from the fact that all charter contracts are presumed to be entered into with a knowledge and consent that they are, in their performance, subject to a legitimate exercise of the police power, the doctrine was early advanced that they are similarly subject to the State's taxing power, that, in other words, the power to tax is as necessarily and inherently a sovereign power of the State and may not be bartered away, or its exercise in any way estopped. The courts have held, however, that this is not so. In many cases, though not without hesitation and against minority protests, exemptions from taxation granted by the State in return for some conceived substantial *quid pro quo* have been held contracts that might

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<sup>16</sup> 97 U. S. 659; 24 L. ed. 1036.

<sup>17</sup> 101 U. S. 814; 25 L. ed. 1079.



not hereafter be impaired. Such exemptions are, however, construed, it need not be said, with extreme strictness.<sup>18</sup>

When, however, the States and their political subdivisions have endeavored to use their taxing power as an indirect means of avoiding explicit contract obligations, the Supreme Court has not hesitated to interpose its veto. Indeed, the court has said that attempted taxation has been the mode most frequently employed for the impairment of contracts.<sup>19</sup>

### Construction of contracts

Under the obligation clause no general power is given to the Federal Supreme Court to review the decisions of State courts as to the proper construction to be given to the terms of a subsisting contract, or as to the validity of a contract. In other words no claim as to the impairment of the obligation of a contract can be predicated simply upon the assertion that a State court has erred in its judgment as to the meaning or validity of a contract. It is thus only when there is a claim that there has been some law enacted and applied which operates to impair the obligation of a contract previously entered into, that the Federal question may be raised that the prohibition of the Constitution has been violated.

The meaning to be given to any State law is primarily to be determined by the State courts, and, so long as only a question of State constitutional law is concerned, the meaning thus given is conclusive upon the Federal courts. Thus, when a State statute is alleged to impair the obligation of a contract it is not the duty of the Federal Su-

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<sup>18</sup> See especially the language of the court in *Stone v. Mississippi*, 101 U. S. 814; 25 L. ed. 1079. See, also, *Chicago Theological Seminary v. Illinois*, 188 U. S. 662; 23 Sup. Ct. Rep. 386; 47 L. ed. 641.

<sup>19</sup> *Murray v. Charleston*, 96 U. S. 432; 24 L. ed. 760.

preme Court itself to construe the act and then to determine whether, as thus construed, it impairs the obligation of a contract; rather, its duty is to take the act as construed and applied by the courts of the State, and, upon that basis, to determine whether or not the obligation of contracts is impaired. The logic of this doctrine is apparent. Whatever may be the literal terms of a State law, if, in fact, it is not so construed by the State authorities as to work an impairment of contracts the inhibition of the obligation clause cannot be said to be violated.<sup>20</sup>

The rule is, however, well established that the Federal Supreme Court will determine for itself, that is, by its own independent judgment, whether or not that which is alleged to be a contract, is in truth a contract when the claim is set up that it has been impaired by a State law. That is to say, the Federal tribunal does not hold itself bound by the decision of a State court which escapes from the application of the obligation clause by holding that the contract, the impairment of which is alleged, is not, in fact a contract.<sup>21</sup>

This doctrine is, of course, applicable not only to the construction of instruments which, it is claimed, constitute contracts between individuals, but also to State laws which, it is alleged, amount to contracts on the part of the States. There has been no serious denial of this from the time of the early case of *Fletcher v. Peck*, in which it was held that the inhibition of the obligation clause applies as well to contracts on the part of the States as to those between private individuals.

Furthermore, the Supreme Court will exercise its own independent judgment as to the constitutionality of a State law as tested by the State constitution, when the

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<sup>20</sup> *Lehigh Water Co. v. Easton*, 121 U. S. 388; 7 Sup. Ct. Rep. 916; 30 L. ed. 1059.

<sup>21</sup> *Jefferson Branch Bank v. Skelly*, 1 Black. 436; 17 L. ed. 173.

law is one which in itself constitutes a contract on the part of the State or supplies the legal basis for the contract which, it is alleged, is impaired by a later law.<sup>22</sup>

### Force of State decisions

In passing upon decisions of State courts overruling their own prior decisions and thereby holding invalid contracts entered into in reliance upon such prior decisions, there is a sharp distinction drawn by the Supreme Court between those cases in which the cause comes before the Federal courts because of the citizenship of the parties thereto, and thence by appeal to the Supreme Court, and those coming to it by writ of error to the highest State courts.

In the latter class of cases the only ground of Federal jurisdiction is that the obligation of a contract has been impaired; that, in other words, a right guaranteed by the Federal Constitution has been violated. In *McCullough v. Virginia*,<sup>23</sup> as in an unbroken line of previous cases, the members of the Supreme Court have all agreed that Federal jurisdiction exists only in case the decision of the State court appealed from has given effect to a State legislative act impairing a contract previously entered into.<sup>24</sup>

In those cases coming to the Federal Supreme Court by way of appeal from a lower Federal court, however, there is no question of Federal jurisdiction, and in them, the Federal courts determine for themselves which, if any, of the decisions of the State courts dealing with the State laws or with principles involved they will follow.

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<sup>22</sup> *State Bank v. Knoop*, 16 How. 369; 14 L. ed. 977; *Ohio Life Ins. Co. v. Debolt*, 16 How. 416; 14 L. ed. 997; *McGahey v. Virginia*, 135 U. S. 662; 10 Sup. Ct. Rep. 972; 34 L. ed. 304.

<sup>23</sup> 172 U. S. 102; 19 Sup. Ct. Rep. 134; 43 L. ed. 382.

<sup>24</sup> In *McCullough v. Virginia* there was disagreement as to whether or not the decision of the State court had given effect to a later statute,

In this class of cases, the Federal jurisdiction of which is based upon the diversity of citizenship of the parties thereto, the doctrine is well established that where a State court has reversed its ruling as to the State law governing a case, the Federal courts will not follow the later decision, when to do so will make it necessary to hold void or to impair the obligation of contracts previously entered into. In other words, the first construction is treated as though it becomes a part of the law or constitutional provision, and the latter and differing construction as a law in amendment or appeal thereof.<sup>25</sup> It may, however, be observed that the courts would have found themselves in fewer logical and constitutional difficulties if they had decided these cases without any reference to the obligation of contracts clause, and solely upon the ground that they had the power, in suits between citizens of different States, to exercise an independent judgment as to when it is proper for them to follow the decisions of the State courts with reference to the construction of State laws. This subject is more fully treated in a later chapter.

Originally the Supreme Court went only so far as to protect a contract entered into under a law which had previously been held valid by the State courts, as against a later decision holding the law unconstitutional and void. Of late, however, the court has taken the further step of protecting contracts entered into under a law before its constitutionality has been upheld in the highest courts of the State, the argument being that a State legislative act is, even in advance of judicial affirmation, presumptively valid, and, therefore, a later ruling of the court to the effect that the law is invalid, operates to impair or destroy the obligation of the contracts which those entering into them

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<sup>25</sup> *Burgess v. Seligman*, 107 U. S. 20; 2 Sup. Ct. Rep. 10; 27 L. ed. 359; *Gelpeke v. Dubuque*, 1 Wall. 175; 17 L. ed. 520.

have a right, at the time, to believe are legally enforceable agreements.

In these cases it is to be observed that the doctrine of the Supreme Court is not only to hold that the obligation clause warrants a refusal upon the part of the Federal courts to follow the constructions given by State courts to their own State laws, but also to hold that a judicial decision is a "law" within the meaning of the provision of the Federal Constitution that no State shall "pass any law impairing the obligation of contracts."<sup>26</sup>

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<sup>26</sup> See especially *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532; 24 Sup. Ct. Rep. 576; 48 L. ed. 778, in which the authorities are carefully reviewed.

## CHAPTER XXXIX

### CONSTITUTIONAL LIMITATIONS UPON THE TAXING POWERS OF THE STATES

#### **Constitutional provisions**

The Constitution lays but one important express limitation upon the States with reference to the exercise of their taxing powers. This is that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing the inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

But other clauses of the Constitution restricting generally the powers of the States operate to limit their powers of taxation. Thus, for example, influential in this respect are the provisions that no State shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws; that no State shall pass any law impairing the obligation of contracts; and that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Also there are the implied limitations that no State shall so use its taxing powers as to interfere with the operation of Federal agencies; and that, being unable to give an extra-territorial effect to its laws, no State may tax property not within its jurisdiction.

The limitations imposed upon the taxing powers of the States by the "comity" clause are elsewhere discussed

in this treatise. It may, however, be here said that, in general, the clause operates to prevent a State from burdening citizens of other States within its borders with heavier taxes than those laid upon its own citizens. This applies not only to the property of non-citizens, but to the business that they may carry on.

### **State taxation of Federal governmental agencies**

The successful maintenance of a Federal government, under any circumstances a most difficult task, is an especially difficult one in the United States where Federal functions are exclusively performed by Federal organs and agencies, and State functions by State organs and agents. This has necessitated the maintenance of a complete machinery of government for the United States, and similarly, a complete political organization for each of the member States of the Union. This arrangement carries with it the general doctrine that the States may not in any wise interfere with the operation of a Federal organ or with the exercise by a Federal agent of his official functions; and that, conversely, the Federal Government may not interfere with the operation of a State agency or the official actions of State officials when acting within the constitutional limits reserved to the States. Illustrations of these general principles will appear throughout this treatise. Their scope and significance are, however, especially exhibited in their application to the Federal and State taxing power, and to a discussion of this special phase of the subject this and the next succeeding paragraphs will be devoted.

That a State may not in the exercise of its reserved powers, interfere with a Federal Governmental agency was settled once and for all by the decisions of the Supreme Court in *McCulloch v. Maryland*.<sup>1</sup> This case was all the

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<sup>1</sup> 4 Wh. 316; 4 L. ed. 579. See, also, *Osborn v. Bank of United States*, 9 Wh. 738; 6 L. ed. 204.

stronger in that the Federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was an agency neither essential to the National Government nor expressly provided for by the Constitution. The power to establish a National Bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and, years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the constitutionality of the bank but had taken the position that, even were it constitutional, she had, under the general power reserved to her of taxing all occupations carried on within her territorial limits, the right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with a Federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate Federal power. In other words, Maryland took the ground that, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one.

### **Property of Federal agencies may be taxed**

In *McCulloch v. Maryland* and *Osborn v. Bank of Ohio* the States had attempted to levy a tax, in the nature of a franchise tax, upon the operations of the Federal bank.



In the Maryland case Chief Justice Marshall said: "The opinion does not deprive the State of any resources which it originally possessed. It does not extend to the tax paid by the real property of a bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

This dictum of Marshall received judicial application in *Thomson v. Union Pacific R. Co.*,<sup>2</sup> in which it was held, that in the absence of any legislation of Congress directing otherwise, the property of a railroad company, chartered by a State, but performing Federal services, might be taxed by the State. Chief Justice Chase speaking for a unanimous court said: "We think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means."

In *Thomson v. Union Pacific R. Co.*, the railroad company concerned, although performing Federal services, was chartered by the State. In *Union Pacific R. Co. v. Peniston*,<sup>3</sup> the same doctrine was applied to a company chartered by Congress. This fact, it was held, did not take the case out of the rule laid down in earlier cases.

In *Owensboro National Bank v. City of Owensboro*<sup>4</sup> it was held that the property of national banks, organized under a Federal statute, is absolutely exempt from State taxation except in so far as Congress has expressly waived this immunity. This doctrine would be in opposition to

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<sup>2</sup> 9 Wall. 579; 19 L. ed. 792.

<sup>3</sup> 18 Wall. 5; 21 L. ed. 787. See, also, *National Bank v. Commonwealth*, 9 Wall. 353; 19 L. ed. 701.

<sup>4</sup> 173 U. S. 664; 19 Sup. Ct. Rep. 537; 43 L. ed. 850.

that declared in *Union Pacific R. Co. v. Peniston* but for the distinction between the national banks as, in themselves, governmental instrumentalities of the United States, and the railroads which are primarily private enterprises, but performing *inter alia* Federal services.

A franchise to be or to act as a corporation granted by a State, may be taxed by a State as a piece of intangible property. But franchises or other rights derived from the Federal Government may not be taxed by the States nor any hindrances placed by the States upon their exercise.<sup>5</sup>

In conformity with the foregoing doctrine it has been held that while the States may tax the capital employed in the manufacture of copyrighted or patented articles, as well as the tangible property embodied in these articles, they may not exact a fee as a condition precedent to the exercise of these federally granted rights, nor can they tax the intangible rights themselves as property.

Of course no State may, in the exercise of its police or other powers, in any way discriminate against patented articles.<sup>6</sup>

Where, by Federal license, an occupation has been authorized by the United States, enjoyment and employment of the license may not be restricted by a State.<sup>7</sup>

That the salary or other emoluments of office of Federal officials may not be taxed by the States has not been

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<sup>5</sup> *California v. Central Pacific Ry. Co.*, 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150.

<sup>6</sup> *Crown Cork & Seal Co. v. Maryland*, 87 Md. 687; *People v. Roberts*, 159 N. Y. 70. See, also, *Webber v. Virginia*, 103 U. S. 334; 26 L. ed. 565; *Allen v. Riley*, 203 U. S. 347; 27 Sup. Ct. Rep. 95; 51 L. ed. 216; and *Ozan Lumber Co. v. Union Co. Nat. Bank*, 145 Fed. 344.

<sup>7</sup> *Moran v. New Orleans*, 112 U. S. 69; 5 Sup. Ct. Rep. 38; 28 L. ed. 653; *Harman v. Chicago*, 147 U. S. 396; 13 Sup. Ct. Rep. 306; 37 L. ed. 216.

questioned, since the doctrine was first declared in *Dobbins v. Commissioners*.<sup>8</sup>

### **State taxation of Federal property**

The principle that property belonging to the United States is not taxable by the States in which it is situated did not receive final judicial affirmation until 1885 in *Van Brocklin v. Tennessee*.<sup>9</sup> Prior to this decision it had been quite generally taken for granted that Federal property was thus exempt from State taxation, but in a number of cases Congress would seem to have implied that it was not confident upon this point since it incorporated into enabling acts for the admission of territories into the Union as States, the requirement that after admission the property of the United States should be exempt from State taxation. The effect of the decision of *Van Brocklin v. Tennessee* was, of course, to hold that these provisions were declaratory merely, and, therefore, superfluous. The fact that the lands concerned in this Tennessee case were acquired by the United States through sales for non-payment of direct taxes levied by an act of Congress and not expressly ceded by the States, was held immaterial.

In *Wisconsin C. R. Co. v. Price County*<sup>10</sup> the doctrine of *Van Brocklin v. Tennessee* was reaffirmed and broadened so as to include not only taxation by the State but by any of its administrative subdivisions.

### **State taxation of Federal securities**

United States securities, it has been held, may not be taxed by the States for the reason that to admit this power would give to the State the authority to impair the borrowing power of the National Government. This was

<sup>8</sup> 16 Pet. 435; 10 L. ed. 1022.

<sup>9</sup> 117 U. S. 151; 6 Sup. Ct. Rep. 670; 29 L. ed. 845.

<sup>10</sup> 133 U. S. 496; 10 Sup. Ct. Rep. 341; 33 L. ed. 687.

early decided in *Weston v. Charleston*.<sup>11</sup> "The tax on government stock," said Marshall who rendered the opinion in the case, "is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

In *Banks v. The Mayor*<sup>12</sup> the attempt to make a distinction between the bonds of the government issued for loans of money and certificates of indebtedness given in payment for supplies purchased, and to hold the latter subject to taxation by the States, was defeated by the court. So also in *Bank v. Supervisors*,<sup>13</sup> United States notes issued under the acts of 1862 and 1863 were held exempt from State taxation.

In *Bank of Commerce v. Commissioners*<sup>14</sup> stock of the United States constituting a part or the whole of the capital stock of a State bank was held not subject to State taxation, the fact that the tax was on the aggregate of the taxpayer's property and not upon the stock by name being held immaterial. So also in the *Bank Tax Case*<sup>15</sup> a State tax on a valuation equal to the amount of capital stock paid in, and surplus, of a State bank was held to be a tax on the property of the institution and, therefore, invalid, in so far as that property consisted of stocks of the United States.

In *Home Savings Bank v. Des Moines*<sup>16</sup> it was held that a State statute directing that shares of stock of State banks should be assessed to such banks, and not to individual shareholders, operated as a tax on the property of the bank and, therefore, in so far as such property represented

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<sup>11</sup> 2 Pet. 449; 7 L. ed. 481.

<sup>12</sup> 7 Wall. 16; 19 L. ed. 57.

<sup>13</sup> 7 Wall. 26; 19 L. ed. 60.

<sup>14</sup> 2 Black. 620; 17 L. ed. 451.

<sup>15</sup> 2 Wall. 200; 17 L. ed. 793.

<sup>16</sup> 205 U. S. 503; 27 Sup. Ct. Rep. 571; 51 L. ed. 901.

Federal securities, violated the immunity of such securities from State taxation.

Where, however, the State tax may properly be held to be a franchise tax upon the State institution, it has been held valid notwithstanding the fact that United States stock constitutes a part of the assets of the institution.<sup>17</sup> So also in *Home Insurance Co. v. New York*<sup>18</sup> it was held that a State statute imposing a tax upon the "corporate franchise or business" of a company, and making reference to its capital stock and dividends only for the purpose of determining the amount of the tax, was not invalid as levying a tax on the capital stock or property of the company, but upon its corporate franchise, and, therefore, not subject to the objection that it imposed a tax on United States securities constituting a portion of the investments of the company. A tax levied upon shares of stock in the hands of their holders it has been uniformly held is not equivalent to a tax upon the company, but upon its corporate franchise, and, therefore, it has been consistently held that the States may tax the shares of a national bank in the hands of the shareholders, or, similarly, the stock of corporations whose investments consist wholly or in part of Federal securities.<sup>19</sup>

Incomes derived from interest on Federal securities, are exempt from State taxation. This was held with reference to the exemption from Federal taxation of incomes derived from State securities, and the same reasoning would of course exclude from State taxation incomes derived from Federal securities.<sup>20</sup>

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<sup>17</sup> *Society for Savings v. Coite*, 6 Wall. 611; 18 L. ed. 907.

<sup>18</sup> 134 U. S. 594; 10 Sup. Ct. Rep. 593; 33 L. ed. 1025.

<sup>19</sup> *Van Allen v. Assessors*, 3 Wall. 573; 18 L. ed. 229; *Palmer v. McMahon*, 133 U. S. 660; 10 Sup. Ct. Rep. 324; 33 L. ed. 772.

<sup>20</sup> *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759.

Congress, by an act approved August 13, 1894, has provided that "circulating notes of national banking associations and United States legal tender notes, and other notes and certificates of the United States, payable on demand, and circulating, or intended to circulate, as currency . . . shall be subject to [State] taxation as money on hand or on deposit."<sup>21</sup>

Bequests to the United States may be subjected to State inheritance taxes, the courts, both State and Federal, holding the tax to be not upon the property bequeathed, but upon its transmission by will or by descent. "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the State legislature assents to a bequest of it."<sup>22</sup>

Further, in *Plumber v. Coler*,<sup>23</sup> it was held that a State inheritance tax might be collected upon a bequest consisting of United States bonds issued under an act of Congress especially declaring them to be exempt from State taxation in any form. In *Murdock v. Ward* it was held that a similar bequest of Federal securities was not exempt from the inheritance tax imposed by the War Revenue Act of Congress of 1898.

By act of June 3, 1864, certain powers of taxation with reference to national banks were given by Congress to the States. This permission now constituting § 5219 of the Revised Statutes measures the entire extent of the State's power of taxation with reference to the national banks. This Federal act has been construed to operate not as a

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<sup>21</sup> For construction of this permission, see *Hibernia Savings & Loan Soc. v. San Francisco*, 200 U. S. 310; 26 Sup. Ct. Rep. 265; 50 L. ed. 495.

<sup>22</sup> *United States v. Perkins*, 163 U. S. 625; 16 Sup. Ct. Rep. 1073; 41 L. ed. 287.

<sup>23</sup> 178 U. S. 115; 20 Sup. Ct. Rep. 829; 44 L. ed. 998.

grant by the United States to the States of a power not previously possessed, but as a removal by Congress of a hindrance to the exercise by the States of a power inherent in them.<sup>24</sup>

### Federal taxation of State agencies

Correlative to the implied limitation upon the States with respect to interference with Federal agencies of government, is the implied obligation upon the Federal Government not to interfere with the operation of the governmental agencies of the States. This limitation upon the Federal Government is not, however, so strictly construed as that laid upon the States. Here, as in every other case, where a conflict arises between the exercise of Federal powers, and of State powers, the State must yield, although, except for this opposition, it would be within its constitutional rights. Thus franchises granted to interstate railway companies by the United States are not taxable by the States.<sup>25</sup> But in *Veazie Bank v. Fenno*<sup>26</sup> the Federal Government, in the exercise of its constitutional powers to control the currency, was permitted to tax out of existence the notes of State banks, although it was not denied that the States had the constitutional power to charter the banks.

In this *Veazie Bank Case* it was argued on behalf of the State that the Federal tax in question was, in effect, a tax on a franchise granted by the State, and as such unconstitutional. The court held that, in fact, the tax was not

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<sup>24</sup> *Van Allen v. Assessors*, 3 Wall. 573; 18 L. ed. 229.

<sup>25</sup> *Calif. v. Pac. R. R. Co.*, 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150.

<sup>26</sup> 8 Wall. 533; 19 L. ed. 482. In *Ex parte Rapier*, 143 U. S. 110; 12 Sup. Ct. Rep. 374; 36 L. ed. 93, it was held that the fact that a lottery company was chartered by a State did not operate to prevent the Federal Government from excluding its tickets from the mails.

upon the franchise of the bank, but declared, *obiter*. "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the rights to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seems to be as properly objects of taxation as any other property."

Finally, in the Federal Corporation Tax Case of *Flint v. Tracy Co.*,<sup>27</sup> the court directly applied this *obiter* doctrine with reference to an excise tax levied upon all corporations with respect to the carrying on or doing business by them. After a review of earlier adjudications the court say: "We therefore reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privilege."

The Supreme Court has not, however, permitted this principle of the supremacy of the Federal Government to authorize the National Government, by taxation or otherwise, to interfere with the States in the exercise of their governmental rights, except in so far as such interference is necessary for the exercise of a Federal power.<sup>28</sup>

In the case of *Collector v. Day*<sup>29</sup> it was held that the

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<sup>27</sup> 220 U. S. 107; 31 Sup. Ct. Rep. 342.

<sup>28</sup> *Lane Co. v. Oregon*, 7 Wall. 71; 19 L. ed. 101.

<sup>29</sup> 11 Wall. 113; 20 L. ed. 122.



Federal Government could not levy an income tax upon the salaries of State officials.

The court go on to point out that the alleged Federal right that was involved, so far from being similar to that sustained in *Veazie Bank v. Fenno*, was included within that sphere of State interest which the court in that case expressly declared to be beyond the taxing power of the Federal Government.

In *Mercantile Nat. Bank v. New York*<sup>30</sup> it was decided that the United States might not tax bonds issued by a State or by one of its municipal bodies, under its authority, and held by private corporations.

In the Income Tax case<sup>31</sup> it was held that a Federal tax might not be levied on income derived from municipal bonds.

In *Ambrosini v. United States*<sup>32</sup> the court held that bonds given to secure the proper enforcement of State laws in respect to the sale of intoxicating liquors, were not subject to Federal taxation.

An interesting case of recent date bearing upon the right of the Federal Government, by taxation or otherwise, to interfere with State governmental operations is that of the State of South Carolina *v. United States*,<sup>33</sup> decided in 1905. In this case was questioned the right of the Federal Government to levy internal revenue taxes upon intoxicating liquors sold under the State dispensary system of South Carolina.

By several statutes the State had assumed the direct control of the wholesale and retail sale of intoxicating liquors within its limits, had established dispensaries, and

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<sup>30</sup> 121 U. S. 138; 7 Sup. Ct. Rep. 826; 30 L. ed. 895.

<sup>31</sup> *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759.

<sup>32</sup> 187 U. S. 1; 23 Sup. Ct. Rep. 1; 47 L. ed. 49.

<sup>33</sup> 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

appointed dispensers therein. The dispensers received fixed salaries, and had therefore no pecuniary interest in the sales, the entire profits therefrom being appropriated by the State, one-half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the State treasury. In previous cases the Supreme Court of the United States had held that the regulation and control of the sale of intoxicating liquors, so far as interstate commerce was not interfered with, was within the legitimate police power of the States, and, indeed, by express congressional statute the States had been permitted to control the sale of imported liquors after their arrival within the States. The question thus was: had the Federal Government the constitutional power to exact taxes from officials appointed and paid by the State of South Carolina and performing functions which the State was constitutionally empowered to entrust to them? The Supreme Court held that, in this particular case, it had.

The court adverted to the fact that in the cases in which a Federal tax upon State agencies had been held unconstitutional, it had been levied upon instrumentalities of government. After a review of the cases the court say: "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

### **Federal taxation of State documents**

In a number of cases in the State courts interesting points have been raised and decided with reference to the obligation imposed by Federal laws to affix stamps to cer-

tain documents. There is little doubt that the United States may in its own courts, or in any other ways refuse to recognize the validity of unstamped documents, but it would seem that it may not dictate to State agencies what instruments they shall accept as valid and enforceable. Though Congress may provide that certain instruments shall be stamped and that if not so stamped they shall not be received as evidence in Federal courts, the States cannot be compelled to exclude them as evidence in their courts upon that ground.

It has also been held by State courts that the United States may not impose a stamp tax upon judicial processes of State courts, or forbid the recording of unstamped mortgages, or tax the official bonds of State officers.<sup>34</sup>

### **Federal exercise of eminent domain in the States**

The relation of the Federal power to State governmental instrumentalities has been further illustrated in the matter of the Federal Government's right of eminent domain, it having been held that the General Government has an implied right of eminent domain which it may exercise within a State with or without that State's consent.<sup>35</sup> Though never authoritatively decided the better opinion is, however, that the United States may not take for its own use land or other property essential to the State in performance of its governmental functions.

### **Special assessments**

The taking by the State of private property in the form of taxes is held to be justified and not a taking of property for public use without compensation, upon the theory

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<sup>34</sup> See Judson *On Taxation*, § 501.

<sup>35</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312; 13 Sup. Ct. Rep. 622; 37 L. ed. 463; *Chappell v. United States*, 160 U. S. 499; 16 Sup. Ct. Rep. 397; 40 L. ed. 510.

that compensation is returned in the form of police protection and of other benefits flowing from the existence of the government. A logical extension of this justification permits the State to levy special taxes upon land embraced within a given district when the proceeds of such taxes are to be spent for improvements which, though of general public utility, are yet for the special and peculiar benefit of that district. For, as the court say in *Lockwood v. St. Louis* <sup>36</sup> "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few . . . . General taxation for a mere local purpose is unjust; it burdens those who are not benefited and benefits those who are exempt from the burden."

In similarity to this principle that the property peculiarly benefited by a public improvement may be called upon, by a special assessment, to bear the cost thereof, is the principle that, in assessing the damages when private property is taken for a public purpose under an exercise of the right of eminent domain, the resulting benefits to the owner from the public use to which his appropriated property is devoted may be subtracted from the value of the property taken. The right thus to set off benefits was denied by the court of appeals of the District of Columbia in several cases, but the Supreme Court of the United States, in *Bauman v. Ross* <sup>37</sup> emphatically repudiated the doctrine, saying: "The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation [of his property]. He is entitled to receive the value of what he has been deprived of and no more. To award him more would be unjust to the public. Consequently, when part

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<sup>36</sup> 24 Mo. 20.

<sup>37</sup> 167 U. S. 548; 17 Sup. Ct. Rep. 966; 42 L. ed. 270.

only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered."

### **Taxes and special assessments distinguished**

Special assessments are, properly speaking, taxes, and yet they are of so peculiar a character that the courts have not infrequently refused to bring them within the meaning of the term "tax." Thus where certain corporations or pieces of property have been by law exempted from taxation, they have, nevertheless, been held subject to special assessments.<sup>38</sup> Again, where State constitutions have provided that taxation shall be equal and uniform, or that all property shall be taxed according to its value, the courts have nevertheless held that special assessments for local improvements may be levied and assessed according to the front-foot rule or by a standard other than that of value.

Judge Cooley quotes the following from a decision of a Mississippi court in illustration of the distinction between a tax and a special assessment:

"A local assessment can only be levied on land, it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied upon the whole State or a known political sub-division as a county or town. A local assessment is levied upon property situated in a district created for the express purpose of the levy and possessing no other function or even existence than to be the thing upon which the levy is made. A tax is a continuing burden

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<sup>38</sup> *Lefevre v. Detroit*, 2 Mich. 586; *Ill. Cen. Ry. Co. v. Decatur*, 126 Ill. 92. See *Michigan Law Review*, II, 455.

and must be collected at short intervals for all the time and without it government cannot exist; a local assessment is exceptional both as to time and locality, it is brought into being for a particular occasion and to accomplish a particular purpose and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet is *like* a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is *like* a tax in that it must be levied for a public purpose and must be apportioned by some reasonable rule among those upon whose property it is levied. It is *unlike* a tax in that the proceeds of an assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed.”<sup>39</sup>

### Constitutional requirements of special assessments

The power of the legislature to establish special taxing districts upon the lands within which a special tax is to be levied, assessed, and collected is limited by the following rules: (1) There must be some reasonable ground for grouping into a single district the lands composing it, and this reasonable ground must, as has been said, be that the lands in question will derive special benefit from the public improvement to meet the expenses of which the tax is levied. It follows, therefore, as of course, that the proceeds of the tax may not be used for other purposes. (2) The tax so levied must be assessed according to a rule

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<sup>39</sup> *Macon v. Patty*, 57 Miss. 378.

uniformly applied throughout the district, which, in its actual operation, will fairly distribute the tax among the several pieces of property affected according to the benefits received or to be received from the public improvement which is undertaken. Whether or not the assessments may be in excess of the benefits is a question to be presently considered, but in any case they must be apportioned generally according to the benefits. By this is not meant that this apportionment must be absolutely exact. This, in most cases, is an impossibility, But, generally speaking, the part of the entire tax borne by each piece of land must agree with the part of the entire benefit received.<sup>40</sup>

When a public improvement is to be undertaken which will result in a special benefit to a particular district, it is not obligatory upon the legislature to levy a special assessment upon that district for the purpose. Whether or not it will do so lies within its free discretion. Also the fact that the proposed improvement will be, to a certain extent, of general benefit to the whole community, does not render invalid a special assessment upon the district especially benefited.<sup>41</sup>

### Special assessments in excess of benefits

It has been seen that the justification for a special assessment is the special benefit received. Logically and justly, it would seem, therefore, that such special assessments should in no case be permitted to exceed, to any substantial extent at least, the benefits which justify them. In fact, however, until recently at least, the rule appears to have been that, so long as they are apportioned according to benefits, they are not necessarily measured in abso-

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<sup>40</sup> *Union Refrigerator Co. v. Kentucky*, 199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150.

<sup>41</sup> *Bauman v. Ross*, 167 U. S. 548; 17 Sup. Ct. Rep. 966; 42 L. ed. 270.

lute amount by such benefits. Thus, for example, in *Bauman v. Ross*, cited above, in which was involved a law which provided that one-half of the amount measured as damages for the taking of the lands needed for the improvement contemplated, should be assessed upon the lands benefited, no provision appeared to meet cases in which the assessments thus provided for might exceed the benefits conferred; yet the court declared: "This fixing of the gross sum to be assessed was within the authority of Congress."

In 1898, however, was decided the case of *Norwood v. Baker*,<sup>42</sup> which seemed to state a new doctrine which was for a time extraordinarily disconcerting. For if, as the case seemed to hold, a special assessment according to some uniform rule of assessment, such as the front-foot rule, could not be applied until it had been determined, after a hearing, that it would not impose upon any particular piece of property a tax in substantial excess of the benefits conferred by the improvement upon that property, the practice and procedure of special assessment throughout the country would in many cases have to be revised.

In a series of cases, decided in 1901, however, the court brought back the law very nearly, if not quite, to its former condition.<sup>43</sup>

Summarizing the result, or rather the tendency of the cases reviewed, it would appear that the Supreme Court has drawn away from the doctrine stated in its earlier cases that a special assessment will be upheld if apportioned

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<sup>42</sup> 172 U. S. 269; 19 Sup. Ct. Rep. 187; 43 L. ed. 443.

<sup>43</sup> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; 21 Sup. Ct. Rep. 625; 45 L. ed. 879; *Tonawanda v. Lyon*, 181 U. S. 389; 21 Sup. Ct. Rep. 609; 45 L. ed. 908; *Wight v. Davidson*, 181 U. S. 371; 21 Sup. Ct. Rep. 616; 45 L. ed. 900. See also, in further development of the doctrine, *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430; 25 Sup. Ct. Rep. 466; 49 L. ed. 819; *Martin v. District of Columbia*, 205 U. S. 135; 27 Sup. Ct. Rep. 440; 51 L. ed. 743.



according to a rule which, in its general operation, distributes the burden of the tax in proportion to the benefits received, even though such assessments may, as to particular pieces of property, be in substantial excess of the benefits received. In place of this doctrine the court, though with considerable falterings, has declared that "when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great" the assessment will not be sustained. Except in such extreme cases, however, the legislative determination as to the propriety of the assessment and of the mode of its apportionment will be held controlling.

### **Property taxed must be within the jurisdiction of the State**

By reason of the due process clause of the Fourteenth Amendment, and as a result from the fact that no State may give extraterritorial force to its laws, the States of the Union are constitutionally disqualified from levying taxes upon property without their several territorial jurisdictions. This principle, simple and absolute in itself, often becomes, however, difficult of application because of the difficulty in determining, in certain cases, when a given piece of property may be legally considered within the jurisdiction of the State attempting to tax it. This difficulty is illustrated in the sections which follow.

The right to tax depending upon the actual or constructive presence within the jurisdiction of the property taxed, and the tax thus operating *in rem* rather than *in personam* against the owner, it follows that, strictly speaking, the owner, not domiciled in the State, cannot be made personally liable for the tax.<sup>44</sup>

All incorporeal hereditaments, for example, as corporate

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<sup>44</sup> Dewey v. Des Moines, 173 U. S. 193; 19 Sup. Ct. Rep. 379; 43 L. ed. 665; Corry v. Baltimore, 196 U. S. 466; 25 Sup. Ct. Rep. 297; 49 L. ed. 556.

franchises, may be taxed only in the State from whose law they are derived and where, consequently, they have their legal *situs*.<sup>45</sup>

### **Taxation of tangible personal property**

The right of the State to tax all real property situated within its borders, (except property of the United States or of a foreign government) has never been questioned. Its inability to tax real property beyond its borders is equally uncontested. In these respects tangible personal property is grouped with real property.

That tangible personal property situated within one State may not be taxed by another State, even though its owner be domiciled therein, is definitely stated in *Union Refrigerator Transit Co. v. Kentucky*,<sup>46</sup> decided in 1905.

### **Taxation of property situated in several jurisdictions**

The instrumentalities through which commerce is carried on between the States and with foreign countries may be taxed by the States as property to the extent that such instrumentalities are within the several territories of the States so taxing them. Thus, buildings used for freight and passenger stations and for offices, roadbeds, rails, machine shops, etc., may be taxed by the States in which they are situated, so long as the tax is a general property tax and not one laid upon them specially, nor at a special rate because of their employment in interstate commerce. In determining, however, the value of these properties, the important principle has been laid down that in estimating the value of the property within the State, of a company doing business in several States, the entire property may

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<sup>45</sup> *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385; 23 Sup. Ct. Rep. 463; 47 L. ed. 513.

<sup>46</sup> 199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150.

be treated as a unit and its value in use as such determined, and the value of the part of the property in the particular State estimated as bearing the same proportion to the whole property as the amount of the business done in the State bears to the whole business done by the company, or the mileage of tracks of a railway company, or of wires, of a telegraph or telephone company, bears to the entire mileage of tracks or wires of the company taxed.

This "unit in use" principle of valuation received an extensive application in the case of *Adams Express Co. v. Ohio State Auditor*,<sup>47</sup> decided 1897, for there the actual tangible property within the State was inconsiderable whereas the value of the entire concern measured by the amount of business done was very great. Furthermore, there was there lacking that physical unity of plant which is found in railroad and telegraph companies.

In taxing the property within the State of a company operating in two or more States the not unusual practice has been to levy the tax on the capital stock of the company, taking as the basis of assessment such proportion of the capital stock as the amount of business done within the State bears to the entire business done; and in railroads, telegraph and telephone companies, determining this proportion by the proportion of the total mileage of track or wires lying within the State. This, for example, was the method employed in the leading case of *Pullman's Palace Car Co. v. Pennsylvania*,<sup>48</sup> decided in 1891. This also was the method employed in *Delaware, L. & W. R. Co. v. Pennsylvania*,<sup>49</sup> in which it was held that in appraising the capital stock, tangible property located in other States might not be included.

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<sup>47</sup> 165 U. S. 194; 17 Sup. Ct. Rep. 305; 41 L. ed. 683.

<sup>48</sup> 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613.

<sup>49</sup> 198 U. S. 341; 25 Sup. Ct. Rep. 669; 49 L. ed. 1077.

### Taxation of movables

In a series of cases the Supreme Court has held that in taxing the rolling stock of railway, sleeping-car and refrigerator companies, a State may estimate the number of cars upon the average kept and used within the State, and for the determination of this average may use any reasonable rule, the one ordinarily employed being that of mileage. Conversely that part of the property of a corporation which upon an average is kept and employed outside of the State may not be taxed.<sup>50</sup>

### Taxation of intangible personal property

Whereas, with reference to the taxation of tangible personal property, the practice has been to determine its *situs* by its actual location, with respect to intangible personalty, the principle of *mobilia sequuntur personam*, has generally, though we shall presently see, not always, been applied.<sup>51</sup>

However, in the case of State Tax on Foreign-Held Bonds,<sup>52</sup> decided in 1873, declarations were made, which, if strictly adhered to, would have greatly embarrassed the States in their attempts to tax intangible personal property. In this case it was declared that bonds and other evidences of indebtedness are property in the hands of the holders, and, when held by non-residents of the State in which issued, are property beyond the jurisdiction of, and therefore not taxable by, that State. The law contested in this case had required that a domestic railroad company should, before the payment of the interest on certain of its bonds, retain out therefrom the amount of

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<sup>50</sup> Pullman Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. Rep. 876; 35 L. ed. 613.

<sup>51</sup> Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 26 Sup. Ct. Rep. 36; 50 L. ed. 150.

<sup>52</sup> 15 Wall. 300; 21 L. ed. 179.

the tax and pay it over to the State. By this direction, it was held, the law operated to impair the obligation of the contract between the company and its non-resident bondholders, and the court held that it was such an impairment because it was not a proper exercise of the taxing power, even though the bonds were secured by mortgages on property situated within the State. The court in its opinion declared: "Debts owing by corporations, like debts owing by individuals are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. . . . A mortgage being a mere chose in action, it only confers upon its holder, or the party for whose benefit it is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner." After admitting that public securities consisting of State bonds and bonds of municipal bodies and circulating bank notes might have a *situs* for taxation apart from the domicile of their owners, the court go on to say: "But all other personal property, consisting of bonds, mortgages, and debts generally, have no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt, are not separated from the possession of the owners."

The principles thus broadly laid down in the State Tax on Foreign-Held Bonds case had soon to be modified, and, in fact, the case has since been held down to the precise point decided. That public securities, consisting of State bonds and bonds of municipal corporations and circulating

notes of banking institutions are exempted from the principles *mobilia sequuntur personam*, is stated in the case itself. But in later cases the same exemption is applied to shares of stock, mortgages, and to a certain extent, to promissory notes and other credits. This will appear in the sections which follow.

### **Taxation of shares of stock, mortgages and credits**

Shares of stock in incorporated companies may be viewed either as property in the hands of their holders or as representing the property of the company. Thus they are viewed in the latter light when their value is taken as measuring the value of the property of the company for the purposes of a property tax upon that company. In such cases, as we have seen, tangible property of the company permanently located outside of the State may not be included in the appraisalment. The States may also levy a license tax upon a domestic corporation, that is, upon its right not simply to be, but to do business within the State, and this license tax it may measure by the value of the capital stock. Also a State may levy a similar tax upon a foreign corporation, unless engaged in interstate commerce, the payment of which is made a condition precedent to its right to enter the State and do business therein, and measure this tax by the nominal or market value of the capital stock of the company. In both of these cases the tax is not, in reality, upon the capital stock, but is measured by it. The present section will be concerned with the taxation of corporate stock as intangible personal property in the hands of its holders or owners.

The declaration of the court in the *State Tax on Foreign-Held Bonds* case, would, if strictly pursued, have prevented the levying of such a tax upon non-resident holders of the stock of domestic corporations, upon the principle of *mobilia sequuntur personam*. In *Tappan v. Merchants'*

National Bank,<sup>53</sup> however, the court held that, as to shares of stock at least, this principle does not reasonably apply, and that, for purposes of taxation, these shares may be separated from the person of their owner and given a *situs* where the corporation has its *situs*, namely, at the place of its incorporation.

In *Savings and Loan Society v. Multnomah*<sup>54</sup> the broad *dicta* of the court in the State Tax on Foreign-Held Bonds cases were again modified, this time with reference to the taxation of mortgages. In this case the court held that mortgages, whether held by residents or non-residents, may be taxed at their full value by the State in which the mortgaged property is located, and that this may be done either by taxing the whole value of the property to the mortgagor or by taxing to the mortgagee the interest represented by the mortgage and the remainder to the mortgagor.

In the preceding paragraphs we have seen that mortgages and shares of stocks have been taken out of the broad doctrine declared in the State Tax on Foreign-Held Bonds case, which placed them under the rule of *mobilia sequuntur personam*. To a very considerable extent the same is true as to promissory notes and similar evidences of indebtedness. The rule of *mobilia sequuntur personam* has, however, not been followed when the notes have been placed in the hands of an agent for receipt of the interest or for the collection of the capital sums. In such cases the *situs* of the notes has in some cases been held to be that of the agent; in others, where there has been apparent a scheme to avoid the payment of taxes, the *situs* has been held to be at the domicile of their owner.<sup>55</sup>

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<sup>53</sup> 19 Wall. 490; 22 L. ed. 189.

<sup>54</sup> 169 U. S. 421; 18 Sup. Ct. Rep. 392; 42 L. ed. 803.

<sup>55</sup> *Kirtland v. Hotchkiss*, 100 U. S. 491; 25 L. ed. 558; *New Orleans v. Stempel*, 175 U. S. 309; 20 Sup. Ct. Rep. 110; 44 L. ed. 174; *Bristol*

### Taxation of franchises

The State which incorporates, and that State only, may tax the franchise of a corporation, that is, its right to be and operate as a corporation.<sup>56</sup>

It would seem, however, that the franchise or permission granted a foreign corporation to do business in a State may be taxed as property in that State. Also, of course, a yearly payment by the companies may be required by that State as a condition precedent to doing business in that State, but such payments partake more of the nature of a license fee than of a tax.

As regards a domestic corporation, a State may tax not only its property, and its franchise (valuing that franchise by net or gross receipts), but also may tax, as property, privileges or rights which it may have granted, as, for example the use of the public streets. The fact that, at the time of the granting of this right or privilege, payment was made therefor by the company, either in the form of a lump sum or a continuing annual amount, does not exempt that right from taxation according to its pecuniary value, any more than does the purchase of a piece of land from the State and payment therefor exempt it from future taxation as property.<sup>57</sup>

That a franchise may be taxed as a piece of property, and that, in estimating the value of this property, the value of the good will of the company may be included, is clearly established in *Adams Express Co. v. Ohio*.<sup>58</sup>

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*v. Washington Co.*, 177 U. S. 133; 20 Sup. Ct. Rep. 585; 44 L. ed. 701; *Blackstone v. Miller*, 188 U. S. 189; 23 Sup. Ct. Rep. 277; 47 L. ed. 439; *State Board v. Comptoir National*, 191 U. S. 388; 24 Sup. Ct. Rep. 109; 48 L. ed. 232; *Buck v. Beach*, 206 U. S. 392; 27 Sup. Ct. Rep. 712; 51 L. ed. 1106.

<sup>56</sup> *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385; 23 Sup. Ct. Rep. 463; 47 L. ed. 513.

<sup>57</sup> *People v. Roberts*, 154 N. Y. 101; 159 N. Y. 70.

<sup>58</sup> 166 U. S. 185; 17 Sup. Ct. Rep. 604; 41 L. ed. 965. See, also,



### Double taxation

We have seen that the right of a State to tax depends upon its jurisdiction over the object taxed, and that this jurisdiction is obtained by either actual or constructive presence of the object within the State's territorial limits. This constructive presence applies to personal property and depends upon the principle *mobilia sequuntur personam*. As to personal property it is thus possible that it may be actually in one State and be there taxed, and constructively in another State and there also taxed. The fact that one State has exercised its jurisdiction with reference to a matter, whether of taxation or otherwise, clearly can impose no obligation upon another State not to exercise such jurisdiction as it may have. This the Supreme Court of the United States has repeatedly recognized.<sup>59</sup>

The double taxation of a piece of property by the same State that is, its taxation twice viewed in the same aspect, is however, forbidden not only by the several constitutions of most of the States, but by the Fourteenth Amendment.

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Metropolitan Ry. Co. v. Tax Commissioners, 199 U. S. 1; 25 Sup. Ct. Rep. 705; 50 L. ed. 65.

<sup>59</sup> Coe v. Errol, 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715; Blackstone v. Miller, 188 U. S. 189; 23 Sup. Ct. Rep. 277; 47 L. ed. 439.

## CHAPTER XL

### THE FEDERAL JUDICIARY: ITS ORGANIZATION

#### Constitutional provisions

The Constitution provides that there shall be a Supreme Court of the United States, and such inferior courts as Congress may from time to time ordain and establish. It is also provided that "the judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office;"<sup>1</sup> and that the judges of the Supreme Court shall be nominated by the President and appointed by and with the advice and consent of the Senate. All the other Federal justices are similarly appointed, but it is in the power of Congress to vest their appointment, "in the President alone, in the courts of law, or in the heads of departments."<sup>2</sup>

With the exception then of the tenure of office,<sup>3</sup> and the constitutional provision regarding the appointment of the justices of the Supreme Court, the form of organization, the number of justices, etc., the Federal courts, including the Supreme Court, are wholly within the control of Congress.

The practice and procedure to be followed in these courts is also within the control of Congress except as to

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<sup>1</sup> Art. III, § 1.

<sup>2</sup> Art. II, § 2, cl. 2.

<sup>3</sup> This exception does not apply to territorial courts, and to such quasi judicial bodies as the Interstate Commerce Commission, these being rather congressional agencies than parts of the Federal judiciary. See *Clinton v. Englebrecht*, 13 Wall. 434; 20 L. ed. 659.

certain mandatory provisions with reference to jury trial, second jeopardy, speedy and public trial, etc., contained principally in the first eight Amendments of the Constitution. These constitutional rights, immunities, and privileges guaranteed to the individual are considered elsewhere.

### **Inferior Federal courts**

By the original Judiciary Act of 1789 provision was made for inferior Federal courts to be known as District and Circuit Courts. The territory of the Union was divided into districts composed of a State or portions of a State, for each of which a District Court was provided; and these districts were grouped into circuits for each of which circuit courts were provided and a Justice of the Supreme Court assigned as Circuit Judge. With the exception of minor changes, as for example, the creation of new districts and circuits and making provision for Circuit Judges in addition to the Justices of the Supreme Court, the system thus established remained undisturbed for over one hundred years. In 1891, Congress created a new class of Federal tribunals known as the Circuit Courts of Appeals, one of these being assigned to each of the existing nine circuits; and in 1911 the circuit courts were abolished. Also in 1909 a Court of Customs Appeals, and in 1910 a Commerce Court were created.

As at present constituted, therefore, the Federal judicial machinery consists of a Supreme Court, Circuit Courts of Appeals, District Courts, a Court of Customs Appeals, and a Commerce Court. In addition to these there are also a Court of Claims, and the Judiciary of the District of Columbia.

### **The Supreme Court—Its organization**

The Supreme Court is at present composed of nine justices—eight associate justices and one chief justice.

It sits at Washington, D. C., and holds annual terms beginning in October and lasting until the end of May.

Each justice of the Supreme Court is assigned to a circuit where, in addition to certain administrative functions with reference to the assigning of judges to particular courts, he may sit in the Circuit Court of Appeals.

### **Circuit Courts of Appeals—Organization**

The Circuit Courts of Appeals created by the act of 1891 are each held by three justices. These may be the Supreme Court Justice of the circuit, the circuit judges, or one or more of the district judges. Two judges constitute a quorum.

### **District Courts—Organization**

There are now about eighty District Courts, nine of which are in the territories. In a few instances two districts are assigned to one judge. For each district a United States district attorney is appointed to represent the interests of the Federal Government. Marshals and other court officers are also provided. District judges must reside within their respective districts. They may, when assigned by the circuit judge or justice or the Chief Justice of the Supreme Court, hold the District or Circuit Court for any other district of the circuit within which their districts lie, and any one of them may upon the designation of the Chief Justice hold the District and Circuit Court of any District in a Circuit contiguous to his own.

### **Court of Customs Appeals**

This court consists of five judges, of whom three constitute a quorum, but the concurrence of three judges is necessary for a decision. The clerk of the court has his office at Washington, D. C., but the court may be held in any one of the judicial circuits.

### **Commerce Court**

The Commerce Court is composed of five judges assigned to it by the Chief Justice of the United States, for periods of five years, from among the circuit judges of the United States. Four judges constitute a quorum, and the concurrence of a majority of the court is necessary for a decision. The court usually sits at Washington, but may, when expedient, sit elsewhere.

### **Court of Claims—Organization**

This tribunal was established in 1855, and is at present composed of five justices. It sits at Washington, D. C., holding one term yearly, beginning the first Monday in December.

### **Judiciary of the District of Columbia**

The Courts of the District of Columbia consist of Police Courts, a Supreme Court, and a Court of Appeals. The Supreme Court consists of a chief justice and five associate justices, each of whom individually holds court for the trial of law, equity and criminal cases. Thence an appeal lies to the Court of Appeals composed of a chief justice and two associate justices. From the Court of Appeals in certain cases an appeal or writ of error lies to the Supreme Court of the United States.

### **The Supreme Court—Original jurisdiction**

The jurisdiction of the Supreme Court is of two kinds,—original and appellate. The appellate jurisdiction is, in turn, of two kinds; that coming by writ of error to the courts of the States, and that by appeal from the inferior Federal tribunals. The original jurisdiction is determined by the Constitution which provides that “In all cases affecting ambassadors, other public ministers and consuls,

and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.”

It has been held that it is not competent for Congress to give to the Court original jurisdiction in other than these specifically enumerated cases. This doctrine is deduced from the constitutional provision that “in *all* other cases . . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.”<sup>4</sup>

### **Inferior courts may be granted jurisdiction of cases within the original jurisdiction of the Supreme Court**

The implication from the foregoing, especially from the last clause, might seem to be that the Supreme Court may not take appellate jurisdiction in cases in which it might exercise original jurisdiction, and, therefore, that it would not be within the power of Congress to give to the inferior Federal courts original jurisdiction over causes cognizable in the first instance by the Supreme Court. The point has never been squarely passed upon by the Supreme Court, but Congress has in fact, in a number of instances, granted such original jurisdiction to inferior Federal courts, and there are a number of judicial *dicta* in support of the constitutionality of the practice.<sup>5</sup>

### **Supreme Court—Appellate Jurisdiction**

The appellate jurisdiction of the Supreme Court, together with the entire jurisdiction of all the inferior Federal

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<sup>4</sup> Art. III, § 2, cl. 3. See *Marbury v. Madison*, 1 Cr. 137; 2 L. ed. 60, and *Muskrat v. United States*, 219 U. S. 346; 31 Sup. Ct. Rep. 250; 55 L. ed. 246.

<sup>5</sup> *Cf.* Garland and Ralston, *Constitution and Jurisdiction of the United States Courts*, § 7. See *Graham v. Strucken*, 4 Blatch. 50; *Ames v. Kansas*, 111 U. S. 449; 4 Sup. Ct. Rep. 437; 28 L. ed. 482, and *United States v. Louisiana*, 123 U. S. 32; 8 Sup. Ct. Rep. 17; 31 L. ed. 69.

courts is wholly within the control of Congress under the constitutional provision that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish," and that "in all other than original cases . . . the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

These exceptions and regulations which Congress is thus authorized to make have reference to the granting and regulation of appeals to the Supreme Court. Congress thus may prevent the exercise of appellate jurisdiction by the Supreme Court by making no provision for appeals or writs of error from the lower Federal or from the State courts, either by failing to grant original jurisdiction to the inferior Federal courts, or by providing that their jurisdiction, when granted, shall be final.

That the appellate jurisdiction of the Supreme Court is within the power of Congress was strikingly manifested in the case of *Ex parte McCardle*.<sup>6</sup> In this case the Supreme Court had assumed jurisdiction by appeal from a Circuit Court, the case argued, and taken under advisement, but while still undecided, Congress by an act deprived the court of appellate jurisdiction over the class of cases to which the one at issue belonged. Thereupon the Supreme Court dismissed the appeal for want of jurisdiction. This congressional action, it was known, had been taken to prevent the court from passing upon the constitutionality of certain "reconstruction" measures. The court, however, said: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make

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<sup>6</sup> 7 Wall. 506; 19 L. ed. 264.

exceptions to the appellate jurisdiction of this court is given by express words."

### **Appeals from the District Courts**

As at present by statute provided, the Supreme Court has the following appellate jurisdiction with reference to the lower Federal Courts.

Appeals or writs of error may be taken from the District Courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in which case, the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

In addition to the foregoing enumerated in the act of March 3, 1911 appeals lie in bankruptcy cases and in certain cases from the Court of Claims, territorial courts, and Court of Appeals of the District of Columbia. The Supreme Court has also the power to issue writs of mandamus, of prohibition to District Courts in admiralty cases, and of certiorari to Circuit Courts of Appeal and to the Court of Appeals of the District of Columbia.

### **Appeals from Circuit Courts of Appeals**

All cases in the Circuit Courts of Appeals, not expressly made final, and in which the matter in controversy exceeds one thousand dollars besides costs, may be reviewed



by the Supreme Court by appeal or writ of error. Inasmuch, however, as most of the judgments and decisions of the Circuit Courts of Appeals are declared final (namely, all cases in which jurisdiction is dependent entirely upon the citizenship of the parties, and all patent, criminal, revenue and admiralty cases) this appellate jurisdiction of the Supreme Court is, relatively, inconsiderable.

The Circuit Court of Appeals may, however, in any case in which its judgment or decree is final, certify to the Supreme Court any question of law upon which it wishes the judgment of the Supreme Court; or the Supreme Court may at any time by certiorari or otherwise require such cases to be certified to it for review and final determination.

### **Writs of error to State courts**

Appellate jurisdiction is exercised by the Supreme Court by writs of error directed to the highest courts of the State in which a decision can be had, in all cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority."

In such cases the Supreme Court may affirm, reverse or modify the judgment or decree of the State court, and

may at its discretion award execution, or remand the same to the court from which it was removed.

In cases brought to the Supreme Court by writs of error from the State courts, the judgment of these courts will not be reversed, whatever construction they may have given to an alleged Federal right, if it appear that there was a local law which, rightly interpreted, would sustain the judgment entered or decree given.

In *De Saussure v. Gaillard* <sup>7</sup> the general rule is declared that to give the Supreme Court jurisdiction on a writ of error to a State court, "it must appear affirmatively not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." And in *Johnson v. Risk* <sup>8</sup> this rule is supplemented by the declaration that: "Where there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then, if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the State courts decided, we ought not to assume that it proceeded on ground clearly untenable. But where a defense is distinctly made, resting on local statutes, we should not, in order to reach a Federal question, resort to critical conjecture as to the action of the court in the disposition of such defense."

In order that this appellate jurisdiction may be effectual the judiciary act also provides that instead of remanding the cause to the State court for a final decision therein,

<sup>7</sup> 127 U. S. 216; 8 Sup. Ct. Rep. 1053; 32 L. ed. 125.

<sup>8</sup> 137 U. S. 300; 11 Sup. Ct. Rep. 111; 34 L. ed. 683.

the Supreme Court may at their discretion, if the cause has been once before remanded, proceed to a final disposition of the same and award execution.

These provisions have remained substantially unchanged since their enactment to the present day.

It will be observed that provision for writs of error from the Federal Supreme Court is made only for those cases in which the judgment in the state tribunals is adverse to the alleged Federal right, privilege or immunity. Where the State decision is favorable, there is, of course, no need, based upon the principle of Federal supremacy, for a Federal review.

The constitutionality of this section of the Judiciary Act was affirmed by the Supreme Court in 1816 in *Martin v. Hunter's Lessee*,<sup>9</sup> and again, in *Cohens v. Virginia*,<sup>10</sup> decided in 1821.

### **Circuit Courts of Appeals—Jurisdiction**

The Circuit Courts of Appeals have appellate jurisdiction over all cases heard in the District Courts except those which are carried to the Supreme Court. The judgments and decrees thus rendered upon appeal are final (except when certified to the Supreme Court) in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States; as well as in all cases arising under the patent, copyright, revenue, criminal and admiralty laws.

### **District Courts—Jurisdiction**

Excepting the less important classes of cases, the jurisdiction of the District Courts, as determined by statute is

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<sup>9</sup> 1 Wh. 304; 4 L. ed. 97.

<sup>10</sup> 6 Wh. 264; 5 L. ed. 257.

as follows: Being the lowest of the Federal Courts, they have no appellate jurisdiction with reference to the other Federal Courts. They have, however, certain appellate powers from the judgments and orders of the United States commissioners in cases arising under the Chinese exclusion laws. Appeals lie to the District Court of Wyoming from judgments in cases of conviction, before the commissioners appointed under the act for the protection of birds and animals or the punishment of crime in the Yellowstone Natural Park. The original jurisdiction of the District Courts, as set out in § 24 of the act of March 3, 1911, is given in the footnote.<sup>11</sup> The jurisdiction

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<sup>11</sup> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

of the District Courts over suits removed into them from the State Courts is considered later.

### **Court of Claims—Jurisdiction**

This court, established in 1855, has general jurisdiction of all "claims founded upon the Constitution of the United

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Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the

States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government

same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the

of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the

United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the

United States, either in a court of law, equity, or admiralty, if the United States were suable." Exception is, however, made of "claims growing out of the late civil war," and "other claims which have hitherto been rejected, or reported on adversely by any court, department or commission authorized to hear and determine the same."

As to the foregoing the District Courts are given concurrent jurisdiction where the amount does not exceed \$10,000. Since the so-called Bowman Act of March 3, 1883, the head of an executive department may refer to the court any claim or matter pending in his department which involves controverted questions of fact or of law, and the court is directed to report its findings of facts and conclusions of law to the department for its guidance. The act also provides that either House of Congress or any of its committees may refer any claim or matter to the court for the determination of the facts involved, and for report of the same to Congress for such action thereupon as it may see fit to take.

All causes are tried by the court without a jury. All claims not brought within six years of the date of their accruing are barred from prosecution.

### **Court of Customs Appeals—Jurisdiction**

To this court is given exclusive appellate jurisdiction to review final decisions of the Board of General Appraisers of Customs in all cases as to the construction of the law, and the facts respecting the classification of merchandise and the rates of duty imposed thereon under such classi-

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right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.



fication, and the fees and charges connected therewith, and all appealable questions as to the laws and regulations governing the collection of the customs revenues.

### **The Commerce Court**

This court has jurisdictions over: "First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit Court of the United States."

### **Jurisdiction of Federal courts based upon diversity of citizenship**

By the Constitution jurisdiction in the Federal Courts may be founded upon either the subject-matters enumerated in Art. III, or upon the character of the parties. This latter class of cases include controversies to which the United States is a party, or between two or more States, between a State and citizens of another State, between citizens of different States, or between a State or a citizen thereof and foreign States, citizens or subjects.

Within the meaning of the clause of the Constitution extending the Federal judicial power to suits between citizens of different States it has been held that any person who is a citizen of the United States, native or naturalized is a citizen of the State in which he is domiciled. United States citizens domiciled in the Territories or the District of Columbia do not come within this rule.<sup>12</sup>

In *Strawbridge v. Curtis* <sup>13</sup> it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must, by reason of citizenship of another State, be capable of suing each of the defendants in a Federal Court, in order to sustain the Federal jurisdiction. This doctrine, thus declared, has never been departed from.

### Citizenship of corporations

It was early decided that a corporation is not a citizen within the meaning of the clause providing that the Federal judicial power shall extend to controversies between citizens of different States, and in theory this is still the law; but if each corporation was conclusively presumed to be a citizen of the State by which it is chartered the practical result would be precisely the same as it now is and for many years has in fact been. Until about 1840, the doctrine prevailed that a corporation being an artificial unit, the court would look behind its corporate personality to see whether the individuals of which it was composed were, each and every one of them, citizens of a State different from that of each of the parties sued.<sup>14</sup> But in later cases this doctrine was repudiated, and the principle stated, first, that the citizenship of the individuals

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<sup>12</sup> *New Orleans v. Winter*, 1 Wh. 91; 4 L. ed. 44; *Hepburn v. Ellzey*, 2 Cr. 445; 2 L. ed. 332.

<sup>13</sup> 3 Cr. 267; 2 L. ed. 435.

<sup>14</sup> *Bank of United States v. Deveaux*, 5 Cr. 61; 3 L. ed. 38.

composing the corporations is to be presumed to be that of the State by which the company was chartered, and, still later, that this presumption is one that may not be rebutted.<sup>15</sup>

A corporation organized in two or more States cannot sue in the Federal courts a citizen of any one of those States.<sup>16</sup>

### **National banks**

When the present national banking system was established, and for more than twenty years afterwards, an express statute authorized the National Banks to sue and be sued in the Federal courts. Since 1887 it has been provided by law that for the purposes of the jurisdiction of the Federal Courts national banks are to be held to be citizens of the States in which they are respectively located, and the Federal Courts have, in general, no other jurisdiction over controversies to which they are a party than that which they would have were such banks citizens of such States.<sup>17</sup>

### **Federally chartered corporations**

It has also been held that a corporation chartered by the United States, except as specifically restricted by Congress, has the right to invoke the jurisdiction of the Federal Courts in respect to any litigation which it may have.<sup>18</sup>

### **Fictitious citizenship**

Federal jurisdiction may not be created by the fictitious assignment of the cause of action, but where the transfer is real, and for a consideration, Federal jurisdiction will

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<sup>15</sup> *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black. 286; 17 L. ed. 130.

<sup>16</sup> *Idem.*

<sup>17</sup> 24 Stat. at L. 552.

<sup>18</sup> *Pacific Railroad Removal Cases*, 115 U. S. 1; 5 Sup. Ct. Rep. 1113; 29 L. ed. 319.

attach even though the transfer is shown to have been made with this end in view.<sup>19</sup>

In order that there may be Federal jurisdiction, mere diversity of residence is not sufficient. There must be diversity of citizenship, and this fact must affirmatively appear in the pleadings.<sup>20</sup>

**Federal jurisdiction of cases arising under the Constitution, treaties and acts of Congress**

The Constitution provides that the Federal jurisdiction shall extend to "all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

In order that Federal judicial power may attach under this grant, it is necessary that the controversy shall constitute what in law is technically known as a "case;" and that, for its decision, the enforcement of some Federal right be substantially involved.

A case is not brought within the Federal judicial cognizance simply because, in the progress of the litigation, it becomes necessary to refer to or give a construction to the Federal Constitution or laws of the United States. "The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."<sup>21</sup>

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<sup>19</sup> *Dickerman v. Northern Trust Co.*, 176 U. S. 181; 20 Sup. Ct. Rep. 311; 44 L. ed. 423.

<sup>20</sup> *Wolfe v. Hartford Life Ins. Co.*, 148 U. S. 389; 13 Sup. Ct. Rep. 602; 37 L. ed. 493.

<sup>21</sup> *Gold Washing & Water Co. v. Keyes*, 6 Otto, 199; 24 L. ed. 656. For a general review of the extent of the Federal judicial power as determined by subject-matter, see *Shoshone Mining Co. v. Rutter*, 177 U. S. 505; 20 Sup. Ct. Rep. 726; 44 L. ed. 864.

**Removal of suits from State to Federal courts**

The protection of Federal law and Federal rights against possible invasion by State law and State authorities may be secured in three ways. First, by vesting in the Federal Courts the exclusive cognizance of all cases in which the enforcement of Federal rights created or recognized by the Constitution, treaties, or congressional statutes, is involved; Second, by providing that all cases, involving these rights, which originate and are prosecuted in the State courts may be finally appealed to the Federal Courts; and, Third, by providing that such cases begun in the State courts may at some stage prior to final determination thereof, be removed into the Federal courts. All these methods have been employed since the beginning of the present government.

In the early years under the Constitution the chief reliance for the ultimate protection of Federal rights against State invasion was upon the right of appeal to the Supreme Court of the United States by writ of error to the State courts having final jurisdiction of a case in which Federal rights, privileges, and immunities were involved, and in which the final decision was adverse to the Federal rights, privileges, and immunities claimed. With respect to very many matters of which jurisdiction might have been granted to the inferior Federal Courts, no such jurisdiction was given by Congress to the Federal courts, these suits being left to the adjudication of the State Courts, with the provision that certain cases might be removed into the Federal Courts, and that in all cases not so removed or removable, appeal might be had to the Federal Supreme Court when the final State judgment was adverse to the Federal right, privilege, or immunity.

Prior to 1887 by successive Acts of Congress the jurisdiction of the inferior Federal Courts had been amplified and the right of removal had been broadened, but in that

year was passed an Act the purpose of which was to limit the right to bring a suit in the Circuit Court and the right to remove into that court a suit brought in a State Court. In construing this statute the Supreme Court has uniformly kept in mind that its object is to limit the jurisdiction of the Federal Courts.

The State Courts are not excluded from the exercise of jurisdiction with reference to all of the classes of cases placed by the Constitution within the possible cognizance of the Federal Courts. Over a very large proportion of these cases Congress has not seen fit to confer jurisdiction on any Federal Court. As to certain of these cases the Federal jurisdiction is held to be necessarily exclusive, and it may by Congress be made so as to all, but as to others the State Courts may be permitted to adjudicate concurrently. That is to say, as to these cases, the two systems of courts may at the same time have equal authority, the suitors being given the option as to which tribunals shall be resorted to.

This concurrence of jurisdiction is founded upon the fact as declared in *Claffin v. Houseman*<sup>22</sup> that while every citizen of a State is a citizen of two distinct sovereignties; these sovereignties are not foreign to each other but have concurrent authority as to place and persons though distinct as to subject-matters. Therefore, as the court say: "Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus a legal or equitable right, acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal

<sup>22</sup> 93 U. S. 130; 23 L. ed. 833. See, also, *The Moses Taylor*, 4 Wall. 411; 18 L. ed. 397.

or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under the law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction."

### **Statutory provision for removal from State to Federal courts**

By the original Judiciary Act of 1789 it was provided that civil suits brought in State courts might be removed into the Federal courts only in case all the necessary defendants were aliens or all the necessary plaintiffs were citizens of the State and all the necessary defendants were citizens of another State and all joined in the petition for removal. By the act of 1866 individual defendants were permitted to remove if their interests could be properly adjudicated without the presence of the other defendants.

By act of 1867 either a plaintiff or defendant could remove upon affidavit that local prejudice would prevent a fair trial. By act of 1887 this right was limited to the defendant. By act of 1875 it was declared that either defendant or plaintiff might remove any case of which the Federal Circuit and the State courts had concurrent jurisdiction. By acts of 1887 and 1888 the jurisdiction of the Circuit Courts was considerably reduced, which of course had the effect of reducing the rights of removal provided for by the act of 1875.

The laws at present governing removal of suits to the Federal Circuit Courts are contained in chapter three of the act of March 3, 1911.

By the original Judiciary Act Congress did not, as it might have done, endow the lower Federal courts with a general jurisdiction in proceedings against Federal officers based upon their official acts. By the famous Force Act

of 1833, however, an act passed at the time of South Carolina's attempted nullification of the United States tariff law, it was provided that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, or on account of any act done under color of his office," the case, at the defendant's instance, might be at once removed from the State to the Federal courts for trial.

This act has been from time to time amended, and now forms § 33 of the act of March 3, 1911. Its constitutionality was first judicially examined by the Supreme Court in *Tennessee v. Davis*.<sup>23</sup> In this case Davis, a Federal revenue officer, killed a man, was arrested therefor, and, when brought to trial, applied for removal to a Federal court under this act. The State of Tennessee denied the constitutionality of this grant of right upon the ground that the act for which Davis was being tried was a violation of State and not of Federal law. This the Federal authorities admitted, but asserted that, inasmuch as the defendant was a Federal official, and claimed to have committed the homicide while in pursuance of his duties as such, the Federal courts had the right to assume jurisdiction of the case in order that the independence and supremacy of Federal authority might be maintained.

It is seen that § 33 gives the power of removal only with reference to suits against revenue officers of the Federal Government. Section 31 however, provides that "when any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever against any person who is denied or cannot enforce in the judicial tribunals

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<sup>23</sup> 100 U. S. 257; 25 L. ed. 648.



of the State or in the part of the State where such suit or prosecution is pending any right secured by him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of, or under color of, authority derived from any law providing for equal rights, as aforesaid, or refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next District Court to be held in the district where it is pending." The constitutionality of this provision has been affirmed. As to all Federal officials other than revenue officers, Federal protection against State action, when necessary, must be sought, in cases not covered by § 31, either by way of writ of error from the highest State court to the Supreme Court of the United States, or, if that be inadequate, by writ of habeas corpus.

## CHAPTER XLI

### THE INDEPENDENCE OF THE FEDERAL JUDICIARY

#### The independence of the Federal judiciary

During the *ante bellum* period the Federal Government often made use of State tribunals and officers for the execution of its laws. Thus State justices of the peace acted as examining magistrates in criminal cases for the Federal courts, State judges officiated in the execution of extradition treaties with foreign countries, aliens were naturalized in State courts, and State jails and penitentiaries were used for the incarceration of Federal criminals. Both because of this admixture of Federal and State judicial agencies, and because the principle of the absolute independence of the Federal Government from State control was not clearly recognized and admitted, the State courts early assumed the right, by the issuance of writs of habeas corpus, to determine whether a fugitive from the justice of a foreign country and fugitive slaves should be surrendered; whether persons in the Federal army were properly held to military service; and even whether persons in the military service of a foreign State should be tried for acts done as belligerents and under the authority of their sovereigns in conformity with the laws of nations. It was not, indeed, until 1859 that it was authoritatively established by the Supreme Court that the State courts were without the constitutional power to interfere in any way with the processes of the Federal courts, or, in truth, with any of the agencies of the National Government. This was determined in *Ableman v. Booth*.<sup>1</sup> Here a State court had

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<sup>1</sup> 21 How. 506; 16 L. ed. 169.

taken possession of and released a prisoner in Federal custody.

The Supreme Court declared the impropriety of these actions in the following language: "We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. But, after the return is made, and the State judge or court is judicially appraised that the party is in custody under the authority of the United States, they can proceed no further."

Notwithstanding this decision, however, a number of the State courts still claimed and exercised the right to discharge enlisted soldiers and sailors of the United States from the custody of their officers, and this practice was not stopped until 1872 when, in *Tarble's case*,<sup>2</sup> the Federal Supreme Court held this to be beyond their power.

Here again, as in the case of *Tennessee v. Davis*,<sup>3</sup> the point at issue narrowed itself down to the question whether or not State agencies should be recognized to have a power which might, should the States see fit, be so exercised as seriously to embarrass the National Government in the performance of its constitutional duties. The strict application of the doctrine of a divided sovereignty would have led in both cases to a constitutional *impasse*. But in these as in other cases the Federal Supreme Court com-

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<sup>2</sup> 13 Wall. 397; 20 L. ed. 597.

<sup>3</sup> 100 U. S. 257; 25 L. ed. 648.

pelled the States in the exercise of their powers to subordinate themselves to the requirements of national convenience and necessity.

This case settled once for all the principle that it is a sufficient return to a writ of habeas corpus issued by a State court that the party is in custody under claim or color of Federal authority derived from either a statute or judicial process.

### **Federal writs of habeas corpus**

Instead of submitting to interference by the States with the exercise of their powers, the Federal courts have, especially of recent years, again and again, on writs of habeas corpus, removed from State custody persons charged with offenses against the peace of the States.

The Judiciary Act of 1789 gave to the Federal court authority to issue the writ of habeas corpus only as to persons in jail under or by color of authority of the United States. No provision was thus made for the release by Federal courts of persons in custody by order of the authorities of a State.

The "Force" Act of 1833 gave to the Federal courts the power to issue writs of habeas corpus in "all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."

In 1842 this authority of the Federal courts was further broadened by the provision that the writ might issue when a subject or citizen of a foreign State, domiciled therein, is in custody because of an act done or omitted under an alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the

validity or effect of which is dependent upon the law of nations.

In 1867 the jurisdiction of the Federal courts was still further widened by the provision that the writ might issue "in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any treaty or law of the United States."

Armed with the authority thus given, especially by the act of 1867, the Federal courts have repeatedly taken from the custody of the States persons charged therein with offenses against State law. Even the lowest of the Federal courts have not hesitated to exercise the power as to persons held for trial before the highest courts of the United States.

The leading case, however, and in some respects, the most extreme, in upholding the power of the Federal courts in the matter of the issuance of writs of habeas corpus to State authorities is that of *Re Neagle*.<sup>4</sup> In that case it was held that without express statutory authorization, the general authority of the President to see that the laws of the Union are faithfully executed empowered him to appoint a deputy marshal to protect a Federal judge whose life was threatened; and that upon such deputy being arrested and brought to trial in a State court upon the charge of murder for a homicide committed while acting within the line of the duty thus assigned him, he was entitled to release on habeas corpus issued by a Federal judge. In this case the objection was raised that inasmuch as there was no Federal statute expressly authorizing such protection as Neagle had been instructed to give, he could not be said, in the language of the act of 1867, to be "in custody for an act done or omitted in pursuance of a law of the United States." To this Judge Miller, who

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<sup>4</sup> 135 U. S. 1; 10 Sup. Ct. Rep. 658; 34 L. ed. 55.

rendered the majority opinion of the Supreme Court, replied: "In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a 'law' within the meaning of this phrase."

### **Writ issued only when imperative**

The Supreme Court of the United States, though uniformly affirming the doctrine that the Federal courts have power, by writ of habeas corpus, to inquire into the cause of the restraint of the liberty of any person by a State when the justification of Federal authorization or immunity is set up for the act complained of, has, however, repeatedly, and of recent years with increasing emphasis, laid down the doctrine that the Federal courts should not, except in cases of peculiar urgency, exercise that power but should leave such persons to pursue their remedy by writ of error to the Federal Supreme Court, after the adjudication of their cases in the States' highest courts.<sup>5</sup>

The act of 1867 provides that, upon the return of the writ of habeas corpus, "the court of justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It would not appear to be certainly settled just what are the facts to be determined and just what action is to be taken by the Federal courts in cases where the party suing out the writ claims that the act charged against him in the State court was done under the authority of the United States or in pursuance of a process of its courts. When, by means of the writ, the Federal court has brought

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<sup>5</sup> *Ex parte Royal*, 117 U. S. 241; 6 Sup. Ct. Rep. 734; 29 L. ed. 868.

the accused under its control, is it its duty in all cases to determine whether the accused was an officer of the United States and further whether he acted in good faith, and within the scope of his Federal authority, and is therefore entitled to discharge; and, if not, to impose such penalty as the law and facts require? Or, where the question is not as to the Federal authority which is set up, but as to whether in fact that authority was overstepped, and there is conflicting evidence as to this, is it the duty of the Federal court to remand the party to the State court for the determination of the question?

The opinion in the *Ableman* and *Tarble* cases, and the reasoning of the court in *Tennessee v. Davis*, would seem to indicate that the former action is the correct one, namely, that the Federal court should not remand the accused to the State court, but itself determine the fact whether he has acted in excess of his Federal authority. In *United States ex rel. Drury v. Lewis*,<sup>6</sup> however, the court accepted the alternative doctrine, and remanded the accused for trial to the State court, the evidence being conflicting, as to whether or not in fact he had exceeded his Federal authority.

That a State court has no power to issue a mandamus or writ of certiorari to a Federal officer is not questioned.<sup>7</sup>

The inability of the State courts by injunction or otherwise to control proceedings in Federal courts is declared in *Weber v. Lee Co.*,<sup>8</sup> *United States v. Keokuk*,<sup>9</sup> and *Supervisors v. Durant*.<sup>10</sup> This inability arises not so much from the supremacy of the Federal courts, as because the State and Federal judicial systems are independent of one an-

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<sup>6</sup> 200 U. S. 1; 26 Sup. Ct. Rep. 229; 50 L. ed. 343.

<sup>7</sup> *M'Clung v. Silliman*, 6 Wh. 598; 5 L. ed. 340.

<sup>8</sup> 6 Wall. 210; 18 L. ed. 781.

<sup>9</sup> 6 Wall. 514; 18 L. ed. 933.

<sup>10</sup> 9 Wall. 415; 19 L. ed. 732.

other. In *Weber v. Lee Co.*<sup>10a</sup> the court say: "State courts cannot enjoin the process of proceedings in the circuit [Federal] courts; not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action." The same reason is given in *United States v. Keokuk*.<sup>10b</sup>

### Injunctions from Federal to State courts

It is, however, not quite correct to say that the two judicial systems are "entirely independent in their sphere of action." It is true that the State courts are wholly without power in any way to control the operations of the Federal courts, but the reverse is not true. As has already appeared, a writ of error lies in certain cases from the Federal Supreme Court to the State courts, and, when removal of a case is sought, the Federal courts may issue a writ of certiorari to the State court demanding a copy of the record, and the clerk of the State court refusing compliance with this demand becomes, under an act of Congress, liable to fine or imprisonment. Furthermore, the Federal courts possess the right to protect their own jurisdictional rights or the rights of parties to suits before them by restraining orders forbidding proceedings in the State courts.

It is true that, actuated by a desire to preserve as far as possible the independence of the State judiciaries Congress, by act of 1793, which is still in force, has provided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such an injunction may be authorized by any law relating to proceedings in bankruptcy." But, in other than cases in bankruptcy, the Federal courts have not hesitated to enjoin proceedings

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<sup>10a</sup> 6 Wall. 210; 18 L. ed. 781.

<sup>10b</sup> 6 Wall. 514; 18 L. ed. 933.



in State courts where this has been necessary to preserve their own jurisdictional rights, or to protect individuals in their Federal rights. Thus in *Dietzsch v. Huidekoper*<sup>11</sup> it was held that the prohibition of § 720 of the Revised Statutes would not prevent a Federal court from issuing an injunction restraining proceedings on a replevin bond, the State suit being based on a judgment obtained in a State court after the defendant had removed the case to the Federal courts and there obtained judgment in his favor.

The circumstances under which the Federal courts will issue injunctions restraining State officials from enforcing, or bringing suits in the State courts to enforce a State act which is alleged to be in contravention of the Federal Constitution will be further considered in Chapter XLV, in which the suability of the State is discussed.

The Federal courts have not been given, nor could they constitutionally be given, the jurisdiction to issue writs of mandamus to compel the performance by State officials of State duties. The constitutional power of Congress to authorize the Federal courts, by writ of mandamus, to compel the performance of duties, whether by State or Federal officials, imposed by Federal law would seem to be beyond question, though Congress has not yet seen fit to grant to these courts the power except as ancillary to jurisdiction already otherwise granted. It is to be remembered, however, that Congress cannot, without the consent of the State, impose upon its functionaries the performance of Federal duties. Where, however, the act ordered is one unconnected with his official state duties, the fact that an individual is a State functionary would not exempt him from the mandatory power of the Federal courts.

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<sup>11</sup> 103 U. S. 494; 26 L. ed. 497.

**State restrictions upon the right of removal of suits from State to Federal courts**

An important question with reference to the maintenance of Federal authority, is as to the authority of the States to prevent foreign corporations from removing into the Federal courts suits brought against them in the State courts by making it a condition precedent to their being allowed to enter the State or to continue to do business therein that they will not exercise this Federal right. Here it is apparent that the question is not so much the right of the State to interfere with the exercise by a Federal court of its jurisdiction when obtained, as it is to prevent that jurisdiction from being invoked.

That the States cannot put restrictions upon the removal of cases from their courts to Federal tribunals any more than they can prevent it was declared in a case arising under the statute of the State of Wisconsin which provided that insurance companies of other States desiring to do business within its limits should sign a written agreement that they would not remove into the Federal courts suits brought against them in the State's courts. One of these companies, having removed a case into the Federal courts notwithstanding its agreement not to do so, the Wisconsin courts, ignoring the fact of its removal, proceeded with the case and rendered judgment against the company. The Supreme Court of the United States, upon appeal to it, declared the judgment void upon the ground that the agreement itself and the statute requiring it were illegal, as no one could be compelled to bind himself in advance not to exercise a right guaranteed to him by the Constitution any more than he could barter away his life or freedom.<sup>12</sup>

When, however, in a later case, the Supreme Court of the United States was asked to issue an injunction for-

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<sup>12</sup> *Home Insurance Co. v. Morse*, 20 Wall. 445; 22 L. ed. 365.

bidding the Secretary of State of Wisconsin to revoke the license of an insurance company that had violated its agreement not to remove, that court held that it could not thus control the action of a State official, even though his action was apparently based upon an improper ground. The court said: "The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute."<sup>13</sup> In other words it was held that the right both of granting and of revoking a license to a foreign corporation to do business within a State belonging to the proper officer of that State, it was not within the competence of a Federal court to determine whether that power was exercised for a good or bad reason or for no reason at all.

But when, in a still later case, there was drawn into question the operation of a statute of Iowa which declared that upon the violation by a foreign insurance company of its agreement not to remove a case to the Federal courts, its license should thereby become void, the Federal Supreme Court held that the violation of an illegal agreement could not of itself operate as a revocation of the company's license. If revoked at all it would have to be by the act of a competent State official, and not, *ipso facto*, by the exercise of a constitutional right.<sup>14</sup>

This entire subject was reviewed in *Security Mutual Life Insurance Co. v. Prewitt*<sup>15</sup> in which it was held that a State may by statute provide that if a foreign insurance company shall remove to a Federal court a case which has been commenced in a State court, the license of such

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<sup>13</sup> *Doyle v. Continental Insurance Co.*, 94 U. S. 535; 24 L. ed. 148.

<sup>14</sup> *Barron v. Burnside*, 121 U. S. 186; 7 Sup. Ct. Rep. 931; 30 L. ed. 915.

<sup>15</sup> 202 U. S. 246; 26 Sup. Ct. Rep. 619; 50 L. ed. 1013.

company to do business within the State shall thereupon be revoked. In its opinion the court say: "It is admitted that a State has power to prevent a company from coming into its domain, and that it has the power to take away the right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the company denied [in this case] is the right of a State to enact in advance that if a company remove a case to a Federal court, its license shall be revoked. We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a Federal court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle case we think is good."

From the foregoing cases it is apparent that no abandonment is really made of the principle that the States are constitutionally incompetent to interfere with or prohibit the exercise of a Federal right. Corporations chartered in one State and doing business in another State may exercise the right of removal given them by the Federal statutes without reference to what the laws of the States in which they are doing business may provide, and this they may do even if they have contracted with those State authorities not to exercise this right. The fact that the State authorities, in the exercise of a power acknowledged to be possessed by them, withdraw, or threaten to withdraw, a privilege which they have granted, furnishes no ground for Federal relief. There is, to be sure a causal

*nexus* between the exercise of the Federal right of removal and of the State's right to withdraw its permission to the foreign corporation to do business within the State's limits. But, legally speaking, there is no connection. Each is the exercise of an independent right. The case is not similar to one where the State interferes with or hinders the operation of a Federal agency, as, for example, by taxation of its franchise. In the cases above considered no attempt is made by the States to declare what cases shall and what cases shall not be removed into the Federal courts, or in any way to interfere with the exercise of their jurisdiction by those courts after the cases have been removed into them. Whenever this has been attempted the Federal courts have prevented it. Thus it has been repeatedly declared that the jurisdiction conferred on the Federal courts cannot in any way be abridged or impaired by the statutes of a State.<sup>16</sup>

So, also, it is held that the proper petition and bond having been filed, the case is considered removed even though the State court may refuse to make an order of removal, and may in fact proceed with the trial of the cause.<sup>17</sup> In such cases, the defendant may, if he chooses, defend the case in the State court, and after final judgment obtain a writ of error from the United States Supreme Court, and in so doing he does not forfeit his right to defend in the lower Federal court. The Circuit Court can issue a writ of certiorari to the State court demanding a copy of the record in the case and the clerk refusing to furnish it becomes liable under a Federal act to fine or imprisonment.<sup>18</sup>

In the recently decided case of *W. U. Telegraph Co. v.*

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<sup>16</sup> *Hyde v. Stone*, 20 How. 170, 15 L. ed. 874; *Smyth v. Ames*, 169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819.

<sup>17</sup> *Marshall v. Holmes*, 141 U. S. 589; 12 Sup. Ct. Rep. 62; 35 L. ed. 870.

<sup>18</sup> Act of March 3, 1875.

Kansas<sup>19</sup> the court takes a position which is somewhat difficult to harmonize with that assumed in the insurance cases. In this case the court held unconstitutional as an interference with interstate commerce a State law exacting from a foreign telegraph corporation, as a condition to being permitted to continue to do a local business within the State, a charter fee of a given per cent of its entire authorized stock. The court declare: "The vital difference between the Prewitt case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of telegraphing was primarily and mainly that of interstate commerce." This is true enough, but the essential fact still remains that the Prewitt case permitted the State to exact of the foreign corporation as a condition to its being permitted to do business within the State that it should forego the exercise of a Federal constitutional right, whereas, in the later case it was held that the State might not as a similar condition impose burdens upon the exercise by the foreign corporation of the Federal right of carrying on interstate commerce, which latter right can scarcely be said to be a more important one than that involved in the Prewitt case. It would seem, therefore, that the decision might better have been based upon the ground suggested by Justice White in his concurring opinion in the later case that the company having been permitted to enter the State and construct its plant there, the onerous conditions attempted to be imposed by the State as a condition to its remaining there were confiscatory and, therefore, wanting in due process of law.

### **Congress may not confer jurisdiction upon State courts**

As has been earlier pointed out the State courts pos-

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<sup>19</sup> 216 U. S. 1; 30 Sup. Ct. Rep. 190; 54 L. ed. 355. See also *Ludwig v. W. U. Tel. Co.*, Feb. 21, 1910.

sess jurisdiction over certain cases concurrently with that possessed by the Federal courts. — This, however, is not a jurisdiction which is conferred upon them by Federal statute, but one which they possess under State law and which they are permitted to retain even after the same jurisdiction is by act of Congress conferred upon the inferior Federal tribunals. Congress, indeed, is without power to confer jurisdiction upon any courts not created by itself.<sup>20</sup>

Congress may, however, delegate to State courts the performance of certain routine functions which do not involve the trial of “cases.”<sup>21</sup> Thus, for example, any State chancellor, judge, or justice of the peace may cause to be arrested and committed or held to trial any person charged with an offense against the United States.

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<sup>20</sup> *Houston v. Moore*, 5 Wh. 1; 5 L. ed. 19.

<sup>21</sup> *Robertson v. Baldwin*, 165 U. S. 275; 17 Sup. Ct. Rep. 326; 41 L. ed. 715.

## CHAPTER XLII

### POLITICAL QUESTIONS

#### Political questions

Elsewhere in this treatise the well-known and well-established principle is considered that it is not within the province of the courts to pass judgment upon the policy of legislative or executive action. Where, therefore, discretionary powers are granted by the Constitution or by statute, the manner in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the existence and extent of these discretionary powers.

As distinguished from the judicial, the legislative and executive departments are spoken of as the political departments of government because in very many cases their action is necessarily dictated by considerations of public or political policy. These considerations of public or political policy of course will not permit the legislature to violate constitutional provisions, or the executive to exercise authority not granted him by the Constitution or by statute, but within these limits they do permit the departments, separately or together, to recognize that a certain set of facts, that a given status, exists, and these determinations, together with the consequences that flow therefrom, may not be traversed in the courts.

In the exercise of his political powers, not only the President, but those acting under his order are exempt from judicial control.<sup>1</sup>

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<sup>1</sup> *Marbury v. Madison*, 1 Cr. 137; 2 L. ed. 60.



No comprehensive enumeration of these political determinations has been attempted by the courts, nor, indeed, is such an enumeration possible. Specifically, however, the following have been decided, as the cases have arisen, to be political and, therefore, not justiciable.

In *Georgia v. Stanton*<sup>2</sup> the court denied that it had jurisdiction, because the matter was a political one, to restrain the Secretary of War and the military authorities from putting into force certain acts of Congress providing for a military "reconstruction" government in the State of Georgia.

In *Foster v. Neilson*,<sup>3</sup> the existence and territorial extent of the sovereignty of the United States or of foreign states, and, of course, as involved herein, the *de jure* character of their governments, were held to be political questions.

In *Ex parte Cooper*,<sup>4</sup> the court expressed itself bound by the action of the political departments claiming that the jurisdiction of the United States extended more than fifty-nine miles from the shores of Alaska.

In *United States v. Palmer*,<sup>5</sup> questions as to the existence of war, belligerency, and neutrality, were similarly held to be political in character, and not subject to judicial determination.

Whether or not a treaty or other international agreement is in force is exclusively within the determination of the

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<sup>2</sup> 6 Wall. 50; 18 L. ed. 721.

<sup>3</sup> 2 Pet. 253; 7 L. ed. 415.

<sup>4</sup> 143 U. S. 472; 12 Sup. Ct. Rep. 453; 36 L. ed. 232. See, also, *Williams v. Suffolk Ins. Co.*, 13 Pet. 415; 10 L. ed. 226, and *Jones v. United States*, 137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691.

<sup>5</sup> 3 Wh. 610; 4 L. ed. 471. See, also, *The Divina Pastora*, 4 Wh. 52; 4 L. ed. 512; *The Santissima Trinidad*, 7 Wh. 283; 5 L. ed. 454, and *Kennett v. Chambers*, 14 How. 38; 14 L. ed. 316.

political departments.<sup>6</sup> So also is the status of accredited agents of foreign countries.<sup>7</sup>

In *Boynton v. Blaine*<sup>8</sup> it was held that a mandamus would not lie to control the executive department with reference to claims prosecuted by it against foreign States in behalf of private persons.

In *Luther v. Borden*<sup>9</sup> the judiciary was declared to be without authority to reverse the decision of the political departments of the national government as to the *de jure* character of two contesting governments of a State of the Union.

In *Martin v. Mott*,<sup>10</sup> it was held that the courts could not question the propriety of the action of the President, acting under the law of 1795, in calling out the militia to suppress an insurrection or to repel an invasion.

In *Neely v. Henkel*<sup>11</sup> it was held to be exclusively the function of the political branch of the government to determine how long the military occupation and control of Cuba should continue.

In *United States v. Holliday*,<sup>12</sup> the question as to the existence of tribal relations among Indians was declared to be a political one.

Though questions of the extent of political jurisdiction are, as has been seen, essentially political in character, they are as between the individual States of the Union justiciable in the Supreme Court. This, however, is due to the express provision of the Constitution giving to that court original jurisdiction over "controversies between

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<sup>6</sup> *Doe v. Braden*, 16 How. 635; 14 L. ed. 1090; *Terlinden v. Ames*, 184 U. S. 270; 22 Sup. Ct. Rep. 484; 46 L. ed. 534.

<sup>7</sup> *Ex parte Baiz*, 135 U. S. 403; 10 Sup. Ct. Rep. 854; 34 L. ed. 222.

<sup>8</sup> 139 U. S. 306; 11 Sup. Ct. Rep. 607; 35 L. ed. 183.

<sup>9</sup> 7 How. 1; 12 L. ed. 581.

<sup>10</sup> 12 Wh. 19; 6 L. ed. 537.

<sup>11</sup> 180 U. S. 109; 21 Sup. Ct. Rep. 302; 45 L. ed. 448.

<sup>12</sup> 3 Wall. 407; 18 L. ed. 182.

two or more States.” This precise question is more particularly discussed in a later chapter dealing with suits between States.

### **Courts will exercise jurisdiction when private rights are involved**

In all of the foregoing cases the courts have held themselves bound by the positions assumed by the executive and legislative departments. When, however, private justiciable rights have been involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.

Thus, as has been set forth in another chapter, treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the courts will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar.<sup>13</sup>

### **Courts will not perform administrative functions**

From the foregoing it appears that the courts themselves decline to assume jurisdiction with reference to matters of a political character. So also, they have held that it is beyond the constitutional power of Congress to impose upon them the performance of duties essentially administrative in nature. The instances in which the lower Federal courts have refused to perform administrative functions are considered in a later chapter. So also, it has been held that these courts sitting as equity tribunals

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<sup>13</sup> *Ex parte* Cooper, 143 U. S. 472; 12 Sup. Ct. Rep. 453; 36 L. ed. 232; *The La Ninfa*, 75 Fed. Rep. 513.

may exercise only those powers of English courts of chancery which were judicial in character, and not those exercised by the chancellor as the representative of the King and by virtue of the King's prerogative as *parens patriae*.<sup>14</sup>

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<sup>14</sup> *Fontain v. Ravenel*, 17 How. 369; 15 L. ed. 80.

## CHAPTER XLIII

### THE LAW ADMINISTERED BY FEDERAL COURTS

#### **Federal courts and international law**

Thus far in our consideration of the Federal courts we have been concerned with their organization and fields of jurisdiction. We turn now to the inquiry as to the law which they administer.

When exercising jurisdiction determined by the nature of the subjects litigated, which subjects have been placed by the Constitution within the legislative control of Congress, the Federal courts of course administer the Federal statutes and the Constitution so far as it is self-executory. In one class of cases, maritime and admiralty matters, the grant by the Constitution of judicial power has been construed to carry with it a grant of legislative power to provide the law to be applied. Where the Federal courts obtain jurisdiction wholly because of the character of the parties, the Federal courts, generally speaking, apply the State or other law which would apply were the suits brought in the State courts. The exceptions to this rule have in a measure been already considered in connection with the impairment of the obligation of contracts, and will be further considered in the next following section. In the present section will be considered the force and applicability of principles of international law in the Federal courts.

In so far as applicable, American courts apply established doctrines of international law. Not, however, in the sense that they apply a body of law which has not

been derived from and based upon the sovereign will of the American State, but upon the theory that this body of rules is first impliedly adopted by the State and thus made a portion of its own municipal law. Resting thus upon the implied assent and adoption of the United States, these principles of international law are subject to express modifications by statute. In the very early case of *The Charming Betsy*,<sup>1</sup> decided in 1804, it seems to have been accepted as a principle not needing argument that the court would be bound by an act of Congress providing a rule different from that laid down by international law, the only observation made being that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."

Where principles of international law are applicable they do not need to be proved as in the case of foreign municipal laws, but may be taken judicial cognizance of by the courts. That is, they may, if not already known to the court, be ascertained by the court by its own study of the proper sources of information.

### **Federal criminal law**

There is no common, non-statutory, Federal criminal law. The Federal courts have no criminal jurisdiction save that given them by statute of Congress; and no act is recognized as a crime against the peace of the United States except as it has been declared such by act of Congress; and Congress has of course no constitutional power to create crimes and affix penalties to the commission thereof except as to subjects or in places which the Constitution places under Federal control. Thus, as a means

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<sup>1</sup> 2 Cr. 64; 2 L. ed. 208. See, also, *The Nereide*, 9 Cr. 388; 3 L. ed. 769; *Hylton v. Guyot*, 159 U. S. 113; 16 Sup. Ct. Rep. 139; 40 L. ed. 95; *The Lottawanna*, 21 Wall. 558; 22 L. ed. 654; and especially, *The Paquete Habana*, 175 U. S. 677; 20 Sup. Ct. Rep. 290; 44 L. ed. 320.

of compelling obedience to the laws which Congress is constitutionally empowered to enact, it may attach criminal penalties to their violation.

But though the Federal courts have no common-law Federal jurisdiction, and though there is no common, non-statutory law for them to administer, they may, and indeed have been authorized by statute to adopt common-law remedies and punishments where Congress has not otherwise provided. Thus § 722 of the Revised Statutes reads:

“The jurisdiction in civil and criminal matters conferred on the District and Circuit courts by the provisions of this Title and of Title ‘Civil Rights’ and of the Title ‘Crimes,’ for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and law of the United States, shall be extended to govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.”<sup>2</sup>

### **Federal courts and the construction of State laws**

By the Constitution the Federal courts are given jurisdiction of all suits between two or more States, between a State and citizens of another State, between citizens of

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<sup>2</sup> As to the modes of procedure, see *Tennessee v. Davis*, 100 U. S. 257; 25 L. ed. 648.

different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In this grant of jurisdiction the determining factor is not the nature of the matter litigated or the law involved, but the character of the parties to the suits. No question of Federal concern, and no construction of a Federal law or constitutional provision need be involved. The subjects to be determined may, and, indeed usually in this class of cases, depend wholly upon the interpretation and application of the laws of one or more of the States. The object in giving this jurisdiction to the Federal courts is thus not the protection of Federal rights, privileges, and immunities, but the provision of tribunals presumably more impartial than would be State tribunals when called upon to adjudicate between citizens of the State in which they are sitting and citizens of other States.<sup>3</sup>

In short, the theory is that the Federal courts when thus called upon by reason of the diversity of citizenship of the parties to construe and apply State law, are to consider themselves as *ad hoc* agents of the State, and, therefore, under an obligation to apply that law as they find it. This obligation was recognized in § 34 of the original Judiciary Act of 1789, now § 721 of the Revised Statutes, which provides that: "The laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This provision has remained unaltered to the present day, and constitutes § 721 of the Revised Statutes. What the proper construction of the State law is, which they are to apply, the Supreme Court of the United States

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<sup>3</sup> Cf. *The Federalist*, No. LXXX.



has repeatedly declared is (subject to the exceptions hereinafter to be described) to be determined by the interpretation that has been given to it by the State that has enacted it.<sup>4</sup>

The rule itself is, it is to be observed, rather one of comity and of statutory creation, than of constitutional necessity. Furthermore even this statutory provision is limited to actions at law. The entire field of equity procedure is thus omitted from its control.<sup>5</sup>

It does not clearly appear just how far the Federal courts, when exercising their equity jurisdiction, are disposed to go in refusing to follow the substantive rules and law of the States. It is, however, quite clear that they take a proper stand when they assert that their equity jurisdiction may not in any way be burdened by State law either by way of definition of what shall constitute equitable causes of action, or what procedure shall be followed or remedies applied. But in not a few cases the language, though for the most part *obiter*, is much broader than this, and indicates an apparent willingness to go beyond this and refuse to follow State law, even in statute form, with reference to substantive matters of law as distinguished from rules of procedure and remedies.

### Rules of evidence and procedure

Generally speaking, Congress may of course provide the rules of evidence to be adopted by the Federal courts and itself establish, or empower the courts themselves to establish, the rules governing their procedure in the trial of cases, the preparing and printing of records, the perfecting of appeals, etc.<sup>6</sup>

<sup>4</sup> *Elmendorf v. Taylor*, 10 Wh. 152; 6 L. ed. 289; *Shelby Co. v. Guy*, 11 Wh. 361; 6 L. ed. 495; *Polk's Lessee v. Wendell*, 5 Wh. 293; 5 L. ed. 92.

<sup>5</sup> *Boyle v. Zacharie*, 6 Pet. 635; 8 L. ed. 527.

<sup>6</sup> *Potter v. National Bank*, 102 U. S. 163; 26 L. ed. 111.

Section 914 of the Revised Statutes provides that in the Federal courts in civil causes other than equity and admiralty, "the practice, pleadings and forms and modes of proceeding" shall conform "as near as may be" to the existing practice in the States in which they sit. There is thus left, even as to these causes, opportunity for variance of practice whether because of constitutional necessity, as for example, with reference to jury trial, or because of statutory direction. Thus the rules with reference to the compulsory production of documentary evidence, the amendment of pleadings, etc., are fixed by Federal statute. So also, it is held that Federal judges are not bound by State rules, with reference to instructing the jury, the granting of new trials, the submission of special issues to the jury, the preparation of a case for appeal, etc.<sup>7</sup>

### Unsettled construction of State law

In *Green v. Neal*<sup>8</sup> it was held that where a State court had changed its former construction of a law, the Federal courts, upon a subsequent case coming before them, should do likewise and thus keep ever in accord with the latest decisions of the State courts.

It would appear, however, that though in general the Federal courts when called upon to apply State laws will follow the last interpretation given to them by the respective State courts, this will not necessarily be done where a change of construction by the State courts has been a recent one, and not supported by such a line of decisions as to have become, to use the language of the opinion in *Shelby v. Guy*,<sup>9</sup> "a fixed and received construction," and especially where the earlier construction is one

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<sup>7</sup> See Bates, *Federal Procedure at Law*.

<sup>8</sup> 6 Pet. 291; 8 L. ed. 402.

<sup>9</sup> 11 Wh. 361; 6 L. ed. 495.

that for a considerable period of time had been the uniformly accepted one in the State courts.

As will later appear, the Supreme Court has held quite firmly to the doctrine that the construction by the State courts of the law relating to real property is to be followed by the Federal courts, but in the recent case of *Kuhn v. Fairmont Coal Co.*<sup>10</sup> the court hold that this shall be the practice only where the State determinations have become established rules of property and action prior to the accruing of the rights of the parties litigant.

In an earlier chapter have been considered the circumstances under which the Federal courts refuse to be bound by the construction given to State law by the State courts when impairment of the obligation of contracts is involved.

### **Federal courts and the common law**

The general principle may be stated that there is no Federal common law; in other words, that the law which the Federal courts apply consists wholly and exclusively of the Federal Constitution, treaties, the statutes of Congress, and the laws common or statutory of the several States of the Union.

The common law of the States consists of the principles of the English common law, developed and modified by American custom and judicial precedent. Having this great substratum of the English common-law principles, the non-statutory law of the several States is, in very many respects, the same throughout the United States. But in other respects, statutory enactment and divergent customs and judicial determinations have led to important differences.

In general, however, excepting where statutes have expressly amended the English common law as it was at the time of the separation from England, or where clear

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<sup>10</sup> 215 U. S. 602; 30 Sup. Ct. Rep. 140; 54 L. ed. 228.

judicial *dicta* to the contrary are to be found, the general doctrines of the English common law are held to be in force.<sup>11</sup>

Strictly applying the doctrine that the Federal courts, when exercising jurisdiction derived from the character of the parties to the causes tried, will apply the laws of the States applicable thereto, there is left no opportunity for the creation of a true Federal common law, outside and independent of the Federal Constitution and the treaties entered into and the laws passed in pursuance thereof.

That the Federal courts have no jurisdiction derived directly from the common law has not been questioned since the early case of *Ex parte Bollman*.<sup>12</sup>

That the Federal courts not only have no common-law jurisdiction, but that, generally speaking, there is no Federal common-law as distinguished from statute law (Constitution, treaties, acts of Congress) was declared in the comparatively early case of *Wheaton v. Peters*.<sup>13</sup>

### Interstate commerce and common law

This general doctrine that there is no Federal common-law requires, however, some explanation, if not qualification. In the first place, with reference to those matters of which interstate commerce is the most important example, general common-law principles are held, in the absence of express legislative provisions to the contrary, to apply,<sup>14</sup> and the principle here stated would seem to be

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<sup>11</sup> Louisiana, whose law is founded on the Roman civil law, is an exception to this, but statute and judicial practice have brought even here the law a long way towards conformity to the common law.

<sup>12</sup> 4 Cr. 75; 2 L. ed. 554.

<sup>13</sup> 8 Pet. 591; 8 L. ed. 1055.

<sup>14</sup> *W. U. Tel. Co. v. Call Publishing Co.*, 181 U. S. 92; 21 Sup. Ct. Rep. 561; 45 L. ed. 765.

applicable with reference to all other matters falling within the control of the Federal Government.

### General commercial law

In *Olcott v. The Supervisors*<sup>15</sup> Justice Strong, speaking for the court, says: "It must be kept in mind that it is only decisions upon local questions, or adjudications upon the meaning of the Constitution or statutes of a State, those which are peculiar to the several States, which the Federal courts adopt as rules for their own judgments."

The doctrine that when the question is not one of peculiarly local law and interest, the Federal courts will determine for themselves, without reference to the decisions of local courts, what the law is, even though it be with reference to subjects exclusively within the legislative control of the States, and over which the Federal courts obtain jurisdictional power only by reason of the citizenship of the parties litigant, has received special application in the field of commercial law. This principle was first laid down in the Supreme Court in the case of *Swift v. Tyson*.<sup>16</sup>

The doctrine thus declared in *Swift v. Tyson* has continued to guide the Supreme Court. Under its operation it has come about that it depends in many cases upon whether suit is brought in a Federal or a State court, as to what law will be held applicable to the matter in dispute.

Summing up the discussion of the topic of Federal courts and State laws, it is apparent that in a number of directions the Federal courts, while deriving jurisdiction from the nature of the parties but presumably applying State law, have in fact built up for themselves a considerable body of law which is neither laid down in the Federal Constitution, treaties and laws of Congress nor

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<sup>15</sup> 16 Wall. 678; 21 L. ed. 382.

<sup>16</sup> 16 Pet. 1; 10 L. ed. 865.

in conformity with the laws of the States as determined by their respective tribunals.

Whether this body of law may properly be termed Federal common law may possibly be questioned. It is unquestionably Federal in the sense that it owes it authority to, and is applied by, the Federal courts; and it is common in that it may be enforced by the Federal courts throughout the Union. There is, however, good reason for holding that it is essentially State law. The fact that it differs from the law as laid down by the State courts is due to the peculiar circumstance that, under our judicial system, two co-ordinate sets of courts have the power to interpret and determine the common law of the several States. In other words, the Federal courts have taken the position that, when sitting for the enforcement of State laws, they do not sit as tribunals subordinate to the State courts, but as tribunals co-ordinate with them; and, therefore, that they have an independent right to determine what is the non-statutory law of the State, using for that purpose the same sources of information that the State courts use in determining for themselves the same facts.

## CHAPTER XLIV

### SUITS BETWEEN STATES AND TO WHICH A STATE OR THE UNITED STATES IS A PARTY PLAINTIFF

Article III of the Constitution provides that the judicial power of the United States shall extend "to controversies between two or more States."

The most important class of cases which have required the exercise of the authority granted to the Supreme Court to adjudicate between States have been those relating to disputed boundaries. Of this class a very considerable number of cases have been adjudicated.

In the earlier of these cases it was urged that the jurisdiction of the Supreme Court extended only to judicial controversies between the States, and that boundary disputes, being political in character, did not fall within the grant. The point was, however, overruled.<sup>1</sup>

In *Louisiana v. Texas*,<sup>2</sup> complaint was made that the agents of the defendant State were administering certain quarantine laws in a manner that discriminated, and were intended to discriminate, against citizens of the complainant State. Upon demurrer it was held that that State had not a direct interest in the premises and was, therefore, not entitled to bring suit.

But in *Missouri v. Illinois*<sup>3</sup> it was held that a State's interest in the health of its citizens was sufficiently sub-

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<sup>1</sup> For the argument, see especially the opinion of Justice Baldwin in *Rhode Island v. Massachusetts*, 12 Pet. 657; 9 L. ed. 1233.

<sup>2</sup> 176 U. S. 1; 20 Sup. Ct. Rep. 251; 44 L. ed. 347.

<sup>3</sup> 180 U. S. 208; 21 Sup. Ct. Rep. 331; 45 L. ed. 497.

stantial and direct to enable it to prosecute a suit to prevent another State from constructing and operating a drainage system which would pollute a river furnishing the water supply to the inhabitants of the former State.

In *Kansas v. Colorado* <sup>4</sup> was raised the question whether one State may obtain an order from the Supreme Court restraining another State from operating irrigation works of such a character as to deplete the water supply of a river rising in that State and flowing into and through the complainant State. It was held that the controversy was of a justiciable nature, and would be entertained by the court. As to the law to be applied, the court held itself bound by the law of neither State, and declared: "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law as the exigencies of the particular case may demand."

The case of *Georgia v. Tennessee Copper Co.*,<sup>5</sup> though not one between States, illustrates a further definition by the Supreme Court of what will constitute a justiciable interest upon the part of a State enabling it to seek relief by Federal judicial process. Here an injunction was granted, at the suit of the State of Georgia, to enjoin the defendant company located in the State of Tennessee from discharging noxious gases from its works over the border of the State upon the territory of the plaintiff. In its opinion the court observed that it is proper to grant relief to a State, as a quasi-sovereign body, under circumstances which would not warrant it in a suit between private persons.

The interesting cases of *New Hampshire v. Louisiana*,<sup>6</sup>

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<sup>4</sup> 185 U. S. 125; 22 Sup. Ct. Rep. 552; 46 L. ed. 838.

<sup>5</sup> 206 U. S. 230; 27 Sup. Ct. Rep. 618; 51 L. ed. 1038.

<sup>6</sup> 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656.



and *South Dakota v. North Carolina*<sup>7</sup> are considered in the chapter dealing with the suability of the States.

### **Suits of States against individuals**

The question as to the character of interests requisite for the institution and maintenance of suits by the States of the Union has necessarily to be considered as well when individuals have been proceeded against as when States have been the parties defendant. The case of *Georgia v. Tennessee Copper Co.* has been spoken of in the preceding paragraph. A few other cases will sufficiently indicate the character and extent of this branch of the Federal judicial power.

In *Pennsylvania v. Wheeling & B. Bridge Co.*<sup>8</sup> upon suit of the plaintiff State the defendant was, by decree, ordered to remove or elevate a bridge which, under color of a Virginia statute, it was constructing, on the ground that it obstructed navigation to and from the ports of Pennsylvania, and that the State, as a State, was interested directly in having the obstruction removed.

In *Wisconsin v. Pelican Insurance Co.*<sup>9</sup> was raised the very important question as to the right of a State to sue in the courts of another State of the United States to recover pecuniary penalties imposed by the criminal law of the plaintiff State. The court held that neither the judiciary article of the Federal Constitution authorized the Federal courts, nor the full faith and credit clause compelled the State courts to entertain such a suit.

In *Mississippi v. Johnson*<sup>10</sup> and *Georgia v. Stanton*<sup>11</sup> the Supreme Court refused to grant injunctions restraining the defendants from executing in the course of their

<sup>7</sup> 192 U. S. 286; 24 Sup. Ct. Rep. 269; 48 L. ed. 448.

<sup>8</sup> 13 How. 518; 14 L. ed. 249.

<sup>9</sup> 127 U. S. 265; 8 Sup. Ct. Rep. 1370; 32 L. ed. 239.

<sup>10</sup> 4 Wall. 475; 18 L. ed. 437.

<sup>11</sup> 6 Wall. 50; 18 L. ed. 721.

official duties, an act of Congress which was alleged unconstitutional to affect rights of the States. The political rights, rights of sovereignty, the court held were not subjects within the power of the judiciary to determine and protect.

In *Texas v. White*<sup>12</sup> proprietary rights of the State were involved, and jurisdiction was assumed by the court and relief granted. So also, in *Craig v. Missouri*,<sup>13</sup> *Florida v. Anderson*,<sup>14</sup> and *Alabama v. Burr*<sup>15</sup> proprietary rights were involved and jurisdiction exercised.

### Suits between the United States and a State of the Union

Article III does not in express terms grant jurisdiction in suits between a State and the United States, but in a number of instances suits brought by the United States against individual States of the Union have been entertained and decided by the Supreme Court.

In *United States v. North Carolina*<sup>16</sup> an action of debt upon certain bonds issued by the defendant State was tried and determined upon its merits, judgment being rendered in favor of the defendant. No question of jurisdiction was discussed in the briefs of counsel or in the opinion of the court. In a later case, however, it was declared that "it did not escape the attention of the court, and the judgment would not have been rendered, except upon the theory, that this court has original jurisdiction of a suit brought by the United States against a State."<sup>17</sup> In this later case the United States again appeared as plaintiff in a suit against a State, this time with reference to a

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<sup>12</sup> 7 Wall. 700; 19 L. ed. 227.

<sup>13</sup> 4 Pet. 410; 7 L. ed. 903.

<sup>14</sup> 91 U. S. 667; 23 L. ed. 290.

<sup>15</sup> 115 U. S. 413; 6 Sup. Ct. Rep. 81; 29 L. ed. 435.

<sup>16</sup> 136 U. S. 211; 10 Sup. Ct. Rep. 920; 34 L. ed. 336.

<sup>17</sup> *United States v. Texas*, 143 U. S. 621; 12 Sup. Ct. Rep. 488; 36 L. ed. 285.

matter of boundary. Here the question of jurisdiction was raised and carefully considered.

Only since 1902 may it be said to have been certainly determined that the Supreme Court may, the United States consenting, assume jurisdiction in suits brought by a State of the Union against the United States. In *Chisholm v. Georgia*,<sup>18</sup> Chief Justice Jay had indicated, *obiter*, that such a suit would not be entertained for the reason that the court would be without power to enforce its orders should judgment be rendered against the defendant. In *Florida v. Georgia*,<sup>19</sup> the United States was allowed by the court to intervene in a suit between two States, but without becoming one of the parties to the record. Also, in *Mississippi v. Johnson*<sup>20</sup> it was indicated that in a proper suit a bill might be filed by a State against the United States. Finally, in *Minnesota v. Hitchcock*,<sup>21</sup> decided in 1902, jurisdiction was squarely asserted and exercised. In that case it was held that a suit by a State to enjoin the Secretary of the Interior of the United States from selling certain Indian lands, was a suit against the United States with reference to a matter regarding which it had consented to be sued.

### **Suits between a State and foreign States or their citizens**

As regards controversies "between a State . . . and foreign States, citizens, or subjects," it may be said that no such suits have ever been brought, and one can, therefore, only speculate as to the extent of Federal judicial power under this clause. We do know, however, by judicial determination, that neither a "Territory;"<sup>22</sup> an

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<sup>18</sup> 2 Dall. 419; 1 L. ed. 440.

<sup>19</sup> 11 How. 293; 13 L. ed. 702.

<sup>20</sup> 4 Wall. 475; 18 L. ed. 437.

<sup>21</sup> 185 U. S. 373; 22 Sup. Ct. Rep. 650; 46 L. ed. 954.

<sup>22</sup> *Smith v. United States*, 1 Wash. Terr. 269.

Indian tribe; <sup>23</sup> nor the District of Columbia <sup>24</sup> is a "State" within the meaning of the word as used in this clause of the Constitution.

Whether or not, if a suit were brought by a foreign State, it would be entertained by the Supreme Court, is very doubtful. A foreign State could not, of course, be compelled to appear as a party defendant in such a suit, and reason might, therefore, seem to suggest that it should not be permitted to appear as a party plaintiff unless, of course, the defendant State should give its consent. Madison took this view: "I do not conceive," he said, "that any controversy can ever be decided in these courts between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made." Story, in his *Commentaries*, takes the same view. On the other hand, however, as we shall find in the next chapter, the Supreme Court has entertained suits brought by the United States against States of the Union without their consent, although they are not permitted to sue the United States without its consent. Still different is the *obiter* doctrine declared by the Supreme Court in the case of *Hans v. Louisiana* approving the dissenting opinion of Justice Iredell in *Chisholm v. Georgia*, according to which it was declared not to have been the intention of the framers of the Constitution to create any new remedies unknown to the law. From this it would follow that the Supreme Court could not take jurisdiction of a case between a foreign State and a State of the Union, even with the consent of both parties.

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<sup>23</sup> *Cherokee Nation v. Georgia*, 5 Pet. 1; 8 L. ed. 25.

<sup>24</sup> *Hepburn v. Ellzey*, 2 Cr. 445; 2 L. ed. 332.

## CHAPTER XLV

### THE SUABILITY OF STATES

#### **A sovereign State may not be sued without its consent**

That a sovereign is not subject to suit, without its consent, is a principle that has come down unchallenged since the time of Rome. It has found expression in the rule that "the sovereign can do no wrong" and has been adopted by the English Common Law as fully as, indeed, if anything, more fully than by the systems of jurisprudence founded upon the Civil Law.

In Civil Law countries the State is often held liable in actions based upon the torts of its agents as well as in those of a contractual nature; whereas, in the United States the individual whose rights have been violated by persons acting under State authority has no remedy against the State, except by express permission, and this permission has never been granted except with reference to contract claims. The injured individual has, however, right of action against the public officials by whose illegal acts he has been wronged, but these officials may be financially irresponsible, and thus the remedy, in fact, be of no value.

In the case of *Chisholm v. Georgia*,<sup>1</sup> decided in 1793, it was held that, under the terms of the Federal Constitution, which provided that the judicial power of the Federal Government should extend to all cases "between a State and citizens of another State," a State may be made party defendant in a suit brought by a citizen of another State.

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<sup>1</sup> 2 Dall. 419; 1 L. ed. 440.

The popular objection to this decision immediately aroused and manifested in the adoption of the Eleventh Amendment is a matter of familiar history. The phraseology that the judicial power of the United States "shall not be construed to extend," instead simply that it "shall not extend" to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, was employed in order to give to the Amendment a retroactive effect, and thus defeat suits similar to that of *Chisholm v. Georgia*, already pending. And thus when the first of these pending cases came before the Supreme Court, it declared, in a unanimous opinion, that all these cases should be dismissed because of want of jurisdiction.<sup>2</sup>

It will be observed that the Eleventh Amendment does not in terms declare that the judicial power of the United States shall not be construed to extend to suits brought against a State by its own citizens. Nor is there anywhere in the Constitution a declaration that the United States itself shall not be sued by one of its own citizens. The Supreme Court has, however, held that, in the absence of an express grant of jurisdiction, such suits are, by the generally accepted principles of public law, beyond the jurisdiction of the courts. Indeed, in the case of *Hans v. Louisiana*<sup>3</sup> the court held that the decision in *Chisholm v. Georgia* had been an erroneous one in holding that a State could be sued by a citizen of another State.

In *New Hampshire v. Louisiana*<sup>4</sup> the Supreme Court refused to countenance the attempt of citizens to evade the operations of the Eleventh Amendment by transferring their pecuniary claims to another State and having that State bring suit in their behalf.

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<sup>2</sup> *Hollingsworth v. Virginia*, 3 Dall. 378; 1 L. ed. 644.

<sup>3</sup> 134 U. S. 1; 10 Sup. Ct. Rep. 504; 33 L. ed. 842.

<sup>4</sup> 108 U. S. 76; 2 Sup. Ct. Rep. 176; 27 L. ed. 656.

In the case of *South Dakota v. North Carolina*,<sup>5</sup> however, the true party of interest was shown to be the plaintiff State. Jurisdiction was assumed by the Supreme Court and a judgment and decree awarded against the defendant State.

*Cohens v. Virginia*<sup>6</sup> held that the Eleventh Amendment did not prevent a suit, originally instituted by a State against an individual, from being appealed to the Supreme Court by the individual for the purpose of asserting a constitutional right as a defense against the charge made against him by the State.

In *Bank of the United States v. The Planters' Bank of Georgia*<sup>7</sup> it was held that a suit against a corporation chartered and partly owned by the State was not a suit against the State. The principle laid down in this case was again applied in the cases of *Briscoe v. Bank of Kentucky*,<sup>8</sup> and *Bank of Kentucky v. Wister*,<sup>9</sup> although the State in these cases was the exclusive owner of the stock of the bank.

### **Effect of Eleventh Amendment upon Federal constitutional rights guaranteed against State violation**

In a series of great cases the Supreme Court of the United States has laid down the doctrine that the Eleventh Amendment does not grant to States nor to their agents a power, unrestrainable by judicial process, either to interfere with the exercise of Federal rights or, under color of unconstitutional legislation, to violate the private rights of individuals. Where this danger has been threatened, writs of injunction have been issued, and, for the perform-

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<sup>5</sup> 192 U. S. 286; 24 Sup. Ct. Rep. 269; 48 L. ed. 448.

<sup>6</sup> 6 Wh. 264; 5 L. ed. 257.

<sup>7</sup> 9 Wh. 904; 6 L. ed. 244.

<sup>8</sup> 11 Pet. 257; 9 L. ed. 709.

<sup>9</sup> 2 Pet. 318; 7 L. ed. 437.

ance by State officials of purely ministerial acts prescribed by law, mandamus has been awarded.<sup>10</sup>

Acting under the right thus declared of preventing a State, or rather the officials of a State, from acting under laws unconstitutional, either because impairing the obligation of contracts, or taking property without due process of law the Federal courts, while declaring themselves unable to secure to private individuals an enforcement of their claims against States, have nevertheless been able to extend their protecting power to prevent the States from taking action upon their part to enforce against individuals and against Federal officials claims not supported by valid laws.

In a number of cases, however, the Supreme Court has not permitted this principle of the legal responsibility of the agents of a State to countenance what is in actual effect a suit not against them personally, but against them officially as agents of the State, and, therefore, in reality against the States themselves whose officials they are. Nor has the court been willing to command the performance by a State official of other than mere ministerial acts in which no official discretion has been involved. The distinctions which have had to be drawn are, however, in many instances, very fine, and cannot be briefly outlined. The more important cases are cited in the footnote.<sup>11</sup>

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<sup>10</sup> *Hans v. Louisiana*, 134 U. S. 1; 10 Sup. Ct. Rep. 504; 33 L. ed. 842; *United States v. Peters*, 5 Cr. 115; 3 L. ed. 53.

<sup>11</sup> *Louisiana v. Jumel*, 107 U. S. 711; 2 Sup. Ct. Rep. 128; 27 L. ed. 448; *Hagood v. Southern*, 117 U. S. 52; 6 Sup. Ct. Rep. 608; 29 L. ed. 805; *Cunningham v. Macon & B. R. R. Co.*, 109 U. S. 446; 3 Sup. Ct. Rep. 292; 27 L. ed. 992; *Pennoyer v. McConnaughy*, 140 U. S. 1; 11 Sup. Ct. Rep. 699; 35 L. ed. 363; *In re Ayers*, 123 U. S. 443; 8 Sup. Ct. Rep. 164; 31 L. ed. 216; *Antoni v. Greenhow*, 107 U. S. 769; 2 Sup. Ct. Rep. 91; 27 L. ed. 468; *In re Tyler*, 149 U. S. 164; 13 Sup. Ct. Rep. 785; 37 L. ed. 689; *Scott v. Donald*, 165 U. S. 58; 17 Sup. Ct. Rep. 265; 41 L. ed. 632; *Smith v. Reeves*, 178 U. S.



**Suits to recover specific pieces of property held by the State**

Thus far in the discussion of the suability of the State, according to American constitutional law, reference has been had to suits involving the recovery of money judgments or the issuance of writs of mandamus or of injunction to State officials. There now is to be considered the question whether the principles which have been laid down are sufficient to warrant suits brought by individuals to recover possession of specific pieces of property held, in their official capacities, by officials of the States or of the United States.

In *United States v. Clark*<sup>12</sup> it was declared by Marshall that the United States was not suable of common right, and unless the plaintiff could bring his suit within the terms of some permissive act of Congress, the court could not entertain it. In the *Siren v. United States*<sup>13</sup> this was quoted with approval and the further observation made that the exemption from suit extends to property of the United States. The interesting point was, however, made in this case, that though a lien attaching to a piece of property owned by the State is not enforceable, the lien itself may exist, and becomes enforceable as soon as the State voluntarily sells or otherwise parts with the actual possession of the piece of property.

In *United States v. Lee*,<sup>14</sup> however, the court held that

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436; 20 Sup. Ct. Rep. 919; 44 L. ed. 1140; *Poindexter v. Greenhow*, 114 U. S. 270; 5 Sup. Ct. Rep. 903; 29 L. ed. 185; *McGahey v. Virginia*, 135 U. S. 662; 10 Sup. Ct. Rep. 972; 34 L. ed. 304; *Reagan v. Trust Co.*, 154 U. S. 362; 14 Sup. Ct. Rep. 1047; 38 L. ed. 1014; *Fitts v. McGhee*, 172 U. S. 516; 19 Sup. Ct. Rep. 269; 43 L. ed. 535; *In re Young*, 209 U. S. 123; 28 Sup. Ct. Rep. 441; 52 L. ed. 714. See, also, Willoughby *Constitutional Law of the United States*, Chapter LIV, "The Suability of States."

<sup>12</sup> 8 Pet. 436; 8 L. ed. 1001.

<sup>13</sup> 7 Wall. 152; 19 L. ed. 129.

<sup>14</sup> 106 U. S. 196; 1 Sup. Ct. Rep. 240; 27 L. ed. 171.

a suit in ejectment against Federal officers in charge of property ownership of which was claimed by the United States (its attorney-general intervening in the suit for the purpose of setting up this claim) was not a suit against the United States. In *Tindal v. Wesley*,<sup>15</sup> this doctrine was applied to one of the States of the Union.<sup>16</sup>

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<sup>15</sup> 167 U. S. 204; 17 Sup. Ct. Rep. 770; 42 L. ed. 137.

<sup>16</sup> But see *Stanley v. Schwalby*, 162 U. S. 255; 16 Sup. Ct. Rep. 754; 40 L. ed. 960; and also the definition of the doctrine of *United States v. Lee* as given in *Cunningham v. Macon & B. R. R. Co.*, 109 U. S. 446; 3 Sup. Ct. Rep. 292; 27 L. ed. 992. The latest judicial phases of the suability of the United States are to be found in *Belknap v. Schild*, 161 U. S. 10; 16 Sup. Ct. Rep. 443; 40 L. ed. 599; *Minnesota v. Hitchcock*, 185 U. S. 373; 22 Sup. Ct. Rep. 650; 46 L. ed. 954; *Oregon v. Hitchcock*, 202 U. S. 60; 26 Sup. Ct. Rep. 568; 50 L. ed. 935, and *International Postal Supply Co. v. Bruce*, 194 U. S. 601; 24 Sup. Ct. Rep. 820; 48 L. ed. 1134.

## CHAPTER XLVI

### ADMIRALTY AND MARITIME JURISDICTION

#### **Admiralty and maritime jurisdiction defined**

Section II, Clause I, of Art. III provides that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

Maritime jurisdiction, as the name itself indicates, is the jurisdiction over matters relating to the sea. To a very considerable extent, then, admiralty jurisdiction and maritime jurisdiction are of like meaning. The terms are not, however, synonymous. Admiralty now has reference, primarily, to the tribunals in which the causes are tried; maritime to the nature of the causes tried. The admiralty and maritime jurisdiction of the United States is then of a double nature; that over cases depending upon acts committed upon navigable waters; and that over contracts, and other transactions connected with such navigable waters. In the former class of cases the jurisdiction is given by the locality of the act; in the latter case by the character of the act or transaction.

The cases falling within the Federal admiralty jurisdiction because of the locality, *i. e.*, of acts upon the high seas and other navigable waters, are, broadly speaking, of two classes; those of prize, arising *juri belli*; and those acts, torts, injuries, etc., which have no reference to a state of war.

Those cases which fall within the admiralty jurisdiction purely because of their maritime nature are those arising out of contracts, claims, etc., with reference to maritime

operations. In actions of tort the test determining jurisdiction is locality; in contracts it is the subject matter.<sup>1</sup>

According to the earlier decisions, the Federal admiralty jurisdiction was confined to cases arising upon the high seas and rivers as far as the ebb and flow of the tide extended. Beginning, however, with *Waring v. Clarke*, and *The Genesee Chief*,<sup>2</sup> decided in 1851, the earlier cases were overruled, and the Federal power declared to extend over all waters that are navigable.

The Federal admiralty jurisdiction being wholly independent of the power to regulate interstate commerce, and attaching whenever the cause of action has arisen on navigable waters, jurisdiction extends over all cases arising upon navigable waters even though they be wholly within the confines of a particular State, provided they be connecting links in a chain of commercial communication between the States. In *The Daniel Ball* <sup>3</sup> the court say: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are so used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

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<sup>1</sup> *Waring v. Clarke*, 5 How. 441; 12 L. ed. 226; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; 12 L. ed. 465.

<sup>2</sup> 12 How. 443; 13 L. ed. 1058.

<sup>3</sup> 10 Wall. 557; 19 L. ed. 999.

In *The Montello* <sup>4</sup> the same principle was applied to the Fox River of Wisconsin, although its navigability was interrupted by rapids and falls around which portages had to be made.

Federal admiralty jurisdiction is not affected by the fact that at the time of the accruing of the cause of action the vessel or vessels concerned are on a voyage between ports of the same State.<sup>5</sup>

In later cases the admiralty jurisdiction of the United States has been construed to extend to cases arising on canals.<sup>6</sup>

In the first of the cited cases it was held that the canals are navigable waters within the meaning of admiralty law; in the latter that canal-boats are ships or vessels within the meaning of the same law.

It has also been held that repairs made to or injuries sustained by, a ship while in dry dock are maritime in character, but the dry dock not being itself used for the purpose of navigation is not a subject of salvage service or of admiralty jurisdiction.<sup>7</sup>

#### **Admiralty jurisdiction does not carry with it general political jurisdiction over navigable waters**

It has been held in an unbroken line of cases that the grant to the United States of admiralty jurisdiction does not, in itself, carry with it any general or political jurisdiction. That is to say, unless Congress has expressly so legislated the State courts still have exclusive cognizance of crimes committed upon their navigable waters, and upon the seas within a maritime league of the shore. In

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<sup>4</sup> 20 Wall. 430; 22 L. ed. 391.

<sup>5</sup> *The Belfast*, 7 Wall. 624; 19 L. ed. 266, overruling previous cases as to this.

<sup>6</sup> *Perry v. Haines*, 191 U. S. 17; 24 Sup. Ct. Rep. 8; 48 L. ed. 73.

<sup>7</sup> *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625; 7 Sup. Ct. Rep. 336; 30 L. ed. 501.

the leading case of *United States v. Bevens*<sup>8</sup> Marshall points out that the delegation to the Federal judiciary carries with it, indeed, a legislative power to render that jurisdiction effective, but it does not operate to take the navigable and territorial waters of a State from without the general jurisdiction of the State in the manner that districts purchased by the Federal Government, with the consent of the legislature of a State, for the erection of forts, arsenals, etc., are so removed.

### Admiralty courts

During the colonial period admiralty jurisdiction in this country was exercised by vice-admiralty courts created by commissions from the British High Court of Admiralty, authority being given to the colonial authorities by their charters to establish these tribunals. After the Declaration of Independence, however, each of the States, in the exercise of their several sovereignties, established admiralty courts with varying powers. In 1777 Congress appointed a standing committee to entertain appeals from the State courts in cases of maritime prizes. Under the Articles of Confederation there was established by Congress a "Court of Appeals in cases of Capture," to which appeals might be taken from the State admiralty courts.

Under the present Constitution admiralty jurisdiction is wholly withdrawn from the States and vested exclusively in the Federal courts.

By the Judiciary Act of 1789 this jurisdiction was vested in the district courts, where it has since remained.

Section 711 of the Revised Statutes provides that the district courts shall have jurisdiction: "Of all civil causes of admiralty and maritime jurisdiction; saving to suitors,

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<sup>8</sup> 3 Wh. 336; 4 L. ed. 404.

in all cases, the right of a common-law remedy, where the common-law is competent to give it.”

In all prize cases an appeal lies direct from the district to the Supreme Court. In other admiralty cases an appeal lies to the Circuit Courts of Appeals.

### **State legislative powers with reference to admiralty matters**

It will be observed that the act vesting admiralty jurisdiction in the district courts saves to suitors, in all cases, their right to a common-law remedy, where that law is competent to give it. The effect of this provision is not to permit the State courts to exercise in any way admiralty jurisdiction, but to give to the suitor the option of pursuing in those courts any common-law right that he may have.<sup>9</sup>

But in no case may a State court entertain a suit in the nature of an admiralty proceeding, that is, to enforce a maritime lien *in rem* against a vessel. This is determined in *The Moses Taylor*<sup>10</sup> and *Hine v. Trevor*.<sup>11</sup>

But though the State courts may not exercise admiralty jurisdiction, it has been held that the State legislatures may by statute create maritime rights, which the Federal district courts, sitting as admiralty tribunals, will enforce. In other words, the State law-making body may create admiralty rights which the State courts may not enforce as such, but which the Federal courts may.<sup>12</sup>

### **Legislative powers of Congress flowing from admiralty and maritime jurisdiction**

The Constitution does not in express terms confer upon

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<sup>9</sup> *Sherlock v. Alling*, 93 U. S. 99; 23 L. ed. 819.

<sup>10</sup> 4 Wall. 411; 18 L. ed. 397.

<sup>11</sup> 4 Wall. 555; 18 L. ed. 451.

<sup>12</sup> *The Lottawanna*, 21 Wall. 558; 22 L. ed. 654; *The Glide*, 167 U. S. 606; 17 Sup. Ct. Rep. 930; 42 L. ed. 296; *The Hamilton*, 207 U. S. 398; 28 Sup. Ct. Rep. 133; 52 L. ed. 264.

Congress the power to legislate with reference to matters maritime, but the grant to the judiciary of jurisdiction over all cases of admiralty and maritime jurisdiction, a jurisdiction which has, as we have seen, been held to be exclusive, has been construed to give to the Federal legislature a power over the law which the Federal courts are thus called upon to interpret and apply.<sup>13</sup>

Though, as appears from the foregoing, Congress, and to a certain extent the State legislatures as well, have the power to fix the substantive law which the Federal admiralty courts are to apply, it is not within the power of these law-making bodies to determine the sphere of admiralty jurisdiction. This, it has been held, is a purely judicial function.

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<sup>13</sup> *Ex parte Garnett*, 141 U. S. 1; 11 Sup. Ct. Rep. 840; 35 L. ed. 631; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578; 3 Sup. Ct. Rep. 379; 27 L. ed. 1038.



## CHAPTER XLVII

### IMPEACHMENT

#### **Constitutional provisions**

The constitutional provisions for impeachment are contained in the clauses cited in the footnote.<sup>1</sup>

It is to be observed that the Constitution makes no mention as to what persons shall be subject to impeachment. According to English precedent all citizens are subject to impeachment, and it was at first asserted by some that the same is true in this country. The limitation of impeachment to the President and the Vice-President and to civil officers of the United States would, however, seem to be implied in the provision that these persons shall be removed from office on impeachment, and that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold office under the United States, and it is now generally agreed that only civil officers may be impeached.

#### **Who are civil officers**

Military officers are not subject to impeachment. No attempt has ever been made to impeach any officer of the army or navy, and, therefore, there have been no pronouncements upon this point. But there has been no question as to this doctrine.

Members of Congress are not officers of the United States, not being commissioned by the President. This

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<sup>1</sup> Art. I, § 2, cl. 5; Art. I, § 3, cl. 6; Art. I, § 3, cl. 7; Art. II, § 2, cl. 1; Art. II, § 4.

point was made at the time of the impeachment of Senator Blount, a resolution to the effect that he was an officer being negatived by a vote of fourteen to eleven.

In the case of the impeachment of Secretary of War Belknap, the issue was raised whether a civil officer, in anticipation of impeachment, may by resignation escape from liability to trial by the Senate. By a vote of thirty-seven to twenty-nine, seven not voting, it was held that the jurisdiction of that body had not been ousted by the resignation and by a later vote it was held that for this decision a two-thirds approving majority was not needed. And it may be noted that, in general, it has been held that the constitutional requirement as to the majority needed for conviction applies only to the final votes upon the question of guilt.

#### **For what offenses impeachment will lie**

The constitutional provision is that impeachment may be had for "treason, bribery, or other high crimes or misdemeanors."

The terms "treason" and "bribery" require no definition. Treason is, indeed, defined in the Constitution itself, and the offense of bribery is sufficiently definite and well known. To the term "high crimes and misdemeanors," practice has given a broad meaning that brings within its connotation offenses not penal by Federal statute. In the first four impeachment trials not a single charge rested upon a statute, and the same was true of some at least of the articles in most of the other trials.

It would also seem to be established that the offense charged need not be one committed in the discharge of official duties.

In short then, it may be said that impeachment will lie whenever a majority of the House of Representatives are for any reason led to hold that the incumbent of a

civil office under the United States is morally unfit for and should no longer remain in his position of public trust.

### **Punishment**

It is constitutionally provided that conviction upon impeachment must result in removal from office. To this may be added disqualification to hold and enjoy in the future any office of honor, trust or profit under the United States. When a criminal offense has been committed the party convicted is still "liable and subject to indictment, trial, judgment and punishment according to law."

The power of the President to grant reprieves or to pardon does not extend to cases of impeachment.

### **Effect of dissolution of Congress**

Whether or not the dissolution of the House preferring the impeachment operates to terminate the charges made has not been determined, the occasion for the determination not having arisen. Reason and analogy with ordinary criminal proceedings and with English practice would seem to answer the question in the negative.

It is scarcely necessary to say that the proceedings and determinations of the Senate when sitting as court of impeachment are not subject to review in any other court.

## CHAPTER XLVIII

### THE ELECTION OF THE PRESIDENT AND VICE-PRESIDENT

#### **The Executive Department**

The President and Vice-President are the only Federal executive officers for whose selection and functions the Constitution makes direct provision, unless, indeed, one includes the Senate to which is intrusted participation in the executive functions of appointments and approval of treaties. That certain great executive departments should be legislatively established was taken for granted, as shown, for example, in the provision that the President "may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices;" and that the appointment of inferior officers may be by Congress vested in the "Heads of Departments." From time to time these great executive departments, as well as certain "commissions" and other executive bodies not falling within any one of the "departments," have been created. The description and organization of these bodies does not fall within the scope of a treatise on constitutional law. We shall be concerned, however, with the manner in which all these executive departments are integrated into one great system with the President as its head and the extent of the directive power which the President may exercise over the civil and military service, and which the higher executive officers may exercise over their subordinates.

In the present chapter will be considered the qualifica-

tion for the Presidency and Vice-Presidency, and the constitutional provisions governing the selection of persons to fill these offices.

### **Appointment of presidential electors—Plenary powers of the States**

The Constitution provides that "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of representatives to which the State may be entitled in the Congress; but no senator or representative, or persons holding an office of trust or profit under the United States shall be appointed an elector."

It will be observed that the Constitution gives complete power to the States in the selection of presidential electors. The provision is that each State shall appoint in such manner as the legislature thereof may direct. There is no requirement as to their election by the people.

As a matter of fact during the early years under the Constitution in many of the States presidential electors were not elected at all, but appointed by the legislatures, and this practice did not wholly disappear until quite recently. South Carolina practiced legislative appointment until 1860, and Colorado appointed in this manner in 1876. At the present time, in all the States, the electors are chosen by popular ballot on a general ticket. It is, however, within the power of the States to provide for their election by districts, and this was done in Michigan in 1892. The constitutionality of this law was questioned in the Supreme Court of the United States, but was upheld by that tribunal in *McPherson v. Blacker*.<sup>1</sup>

The States having plenary power over the appointment of electors may make provision by law for the contingency of an elector dying between the date of his appointment

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<sup>1</sup> 146 U. S. 1; 13 Sup. Ct. Rep. 3; 36 L. ed. 869.

and the time for the casting of his vote, or by sickness or accident being prevented from casting his vote.

### **Original provision of the Constitution as to election of President and Vice-President—Inadequacy of**

According to the original provision of the Constitution the electors might vote for two persons without indicating which was their choice for President, and which for Vice-President. The person having the greatest number of votes was to be President, if such number were a majority of the whole number of electors appointed; and if there were more than one person having such majority, and having an equal number of votes, the House of Representatives was authorized by ballot to choose one of them for President. If no person had a majority, the House was to choose the President from the five highest in the list.

When so choosing the House was to vote by States, the representation from each State having one vote. In every case, after the choice of President, the person having the greatest number of votes was to be declared Vice-President; and if there should remain two or more having equal votes, the Senate was to choose them by ballot.

### **Twelfth Amendment**

The inadequacy of the original constitutional provisions for the election of the President and Vice-President early became manifest. John Adams became Vice-President in 1796 though he did not receive half the votes. In 1800 Jefferson and Burr received the same number of votes, and each a majority. There was no question, however, that the electors desired that Jefferson should be President and Burr Vice-President; but, had it not been for the patriotism of Hamilton and a few other Federalists, Burr would have been selected President though he had not been the choice of probably a single elector for that office. This experience was sufficient to lead in 1804 to

the adoption of the Twelfth Amendment in substitution for Clause 3 of § 1, of Art. II.

### Counting the votes

With reference to the action of the Houses of Congress, after the selection of electors has been certified to them, the Twelfth Amendment, copying the language of the original provision of the Constitution, declares that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes *shall then be counted*."

The meaning of the last four words has been shrouded in doubt, and this doubt came very near to leading to serious consequences in 1876-1877. No declaration, it is to be observed, is made as to who shall do the counting, and therefore, who shall determine what votes shall be counted in case there is question as to their regularity or correctness. In 1876, as is well known, there were enough votes, the validity of which was contested, to determine the election. Upon the part of the Republicans it was claimed that the Vice-President (a Republican) should do the counting. The Democrats, however, asserted that the two Houses voting separately should perform this duty. As the Democrats were then in control of the lower House, and the Republicans of the Senate, this would have meant a deadlock. The *impasse* was finally broken, as is well known, by the very doubtful constitutional expedient of a special electoral commission to which all disputed cases should be submitted, the Congress being pledged to be guided by its decisions.

### Law of 1887

By a law of February 3, 1887,<sup>2</sup> the whole matter of the election of the President is attempted to be regulated.

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<sup>2</sup> 24 Stat. at L. 393. For a valuable criticism of this act see Dougherty, *The Electoral System of the United States*.

By the first section the second Monday in the January succeeding their appointment is fixed for the meeting of the electors and the giving of their votes. The postponement from the date formerly in force, namely, the first Wednesday in December, is to give the States full opportunity to determine any questions that may arise with reference to the appointment of their respective electors.

The second section of the act declares: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for the final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determinations shall have been made at least six days before the time fixed for the meeting of the electors, such determinations made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

The effect of this section is, it will be seen, not to delegate to the States the counting of the electoral votes, but to determine what the two Houses of Congress, acting concurrently, will, under certain circumstances, consider conclusive evidence as to the regularity of the selection of the electors whose votes they are to count.

The act goes on in § 3 to provide that the executive of each State shall, under the seal of the State, transmit to the Secretary of State of the United States a certificate showing what electors have been appointed, the votes cast for them, and, where there has been a controversy or contest, the manner in which settled. These certificates the Secretary of State is to publish in some news-



paper, and at their first meeting send copies thereof to the two Houses of Congress. Each elector is also to be supplied with the same certificate, in triplicate, under the seal of the State. As determined by a previous law, one of these copies is to be sent by messenger to the President of the United States Senate at Washington, D. C., one to be forwarded to him by mail, and the third delivered to the judge of the district in which the electors assemble to cast their vote.

Sections 4, 5 and 6 of the law regulate the counting by Congress of the electoral votes as reported by the State.

The final section (7) provides that the joint meeting of the two Houses "shall not be dissolved until the count of electoral votes shall be completed, and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of each House, not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall have not been completed before the fifth calendar day next after such meeting of the two Houses, no further or other recess shall be taken by either House."

### **Presidential succession**

The Constitution provides that: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as

President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

### Act of 1792

The Act of March 1, 1792, relative to the election of the President and Vice-President also fixed the succession in case of the death, removal, resignation, or disability of these officers. It declared: "In case of removal, death, resignation or disability both of the President and Vice-President of the United States, the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected."

These sections of the act of 1792, though open to both constitutional and political objections, remained in force until 1886. By an act passed that year the President *pro tempore* of the Senate or the Speaker of the House no longer appear in the line of succession, their places being taken by heads of the executive departments in a stated order.

The Constitution provides that the President and Vice-President shall hold office for the term of four years. The proper length of time and the propriety of forbidding re-election, were discussed in the Convention and the four-year period with eligibility to re-election finally agreed upon. Nothing is said in the Constitution as to the number of times the same person may be re-elected President, but, as is well known, the propriety of restricting to two the number of successive terms has become firmly rooted in the American mind.

## CHAPTER XLIX

### THE POWERS AND DUTIES OF THE PRESIDENT

By § I of Art. II, it is declared that "The executive power shall be vested" in the President. By § III it is required that "he shall take care that the laws are faithfully executed." In ultimate resort, then, all Federal executive authority is in the President, and upon him lies the responsibility for seeing that the laws of the United States are faithfully executed, that is to say, that the armed and other forces of the Nation are, if necessary, employed to maintain in efficient operation the government of the United States over such districts as are under its sovereignty, and everywhere and under all circumstances to protect its officers in the performance of their duties.

In fulfilment of the responsibility thus constitutionally imposed, the President has, by necessary implication, the power to use all the specific powers conferred by the Constitution upon him. Chief of these is, of course, his authority as Commander-in-Chief of the land and naval forces of the Nation. He has also authority in many directions given him by statutes of Congress, with reference, for example, to the use of the militia, and to giving orders to subordinate executive officials.

Aside from these express powers, and those necessarily implied in them, the President has no authority to act.<sup>1</sup>

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<sup>1</sup> But see *In re Neagle*, 135 U. S. 1; 10 Sup. Ct. Rep. 658; 34 L. ed. 55. In this case the court comes perilously near to holding, if in

That is to say, the obligation to take care that the laws of the United States are faithfully executed, is an obligation but confers in itself no powers. It is an obligation which is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer. At the time of the threatened resistance of the people of the Southern States to Federal law in 1860, President Buchanan, under the advice of his Attorney-General, held himself practically powerless because of the lack of statutory authority to take the necessary steps. President Lincoln, upon his assuming office, gave a broader interpretation to existing laws conferring authority upon him, and Congress soon by statute further increased his powers.

### **The president as administrative chief**

The functions of a chief executive of a sovereign State are, generally speaking, of two kinds—political and administrative. In different countries, with different governmental forms, the emphasis laid respectively upon each of these functions varies. In some, the powers and influence of the executive head are almost wholly political. In others, as for example Switzerland, the political duties of the executive are so fully under legislative control that the chief importance is upon the administrative side.

In the United States it was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose functions should, in the main, consist in the performance of those political duties which are not subject to judicial control. It is quite clear that

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fact it did not actually hold, that the President has inherent executive power; that is, powers inherent in him as chief executive, and not as expressly given him by the Constitution, or implied from the powers expressly given, or constitutionally granted to him by Congress.

it was intended that he should not, except as to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate Federal administrative agents. The acts of Congress establishing the Department of Foreign Affairs (State) and of War, did indeed recognize in the President a general power of control, but the first of these departments, it is to be observed, is concerned chiefly with political matters, and the second has to deal with the armed forces which by the Constitution are expressly placed under the control of the President as Commander-in-Chief. The act establishing the Treasury Department simply provided that the Secretary should perform those duties which he should be directed to perform, and the language of the act, as well as the debates in Congress at the time of its enactment, show that it was intended that this direction should come from Congress. Furthermore, the Secretary is to make his annual reports not to the President, but to Congress.<sup>2</sup> In similar manner the Post-Office Department, when first permanently organized in 1794, was not placed under the control of the President. The act gives in detail the duties of the Postmaster-General and there is no suggestion that in the exercise of these duties he is to be under other than congressional direction.

The constitutional power of Congress thus to assume direction of the administrative departments of the Government received the approval of the Supreme Court in *Kendall v. United States*.<sup>3</sup>

Despite this obvious original intention to confine the duties of the President mainly to the political field, the President has in practice become the head of the Federal

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<sup>2</sup> Cf. Goodnow, *American Administrative Law*, 78.

<sup>3</sup> 12 Pet. 524; 9 L. ed. 1181.

administrative system. This has been due to two causes. In the first place the President's power to remove from office, a power which he may exercise at will, has easily enabled him to obtain administrative action even when he has not had legal power directly to command it. This was clearly shown in the episode of the removal of the bank deposits by Jackson. In the second place the practical necessities of efficient government have compelled Congress to place in the President's hands powers of administrative discretion, and have inclined the courts to uphold his orders whenever it has been possible to do so.<sup>4</sup>

Even where the President has not the power to command he has the constitutional right to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."

Acting under his constitutional obligation to take care that the laws be faithfully executed, the President may take such steps as are necessary and the laws permit, to compel the proper performance of their respective duties by Federal agents generally. This duty does not, however, make the President responsible for every act committed by a subordinate administrative official, nor, even where a duty is expressly laid upon him by the Constitution or by statute, is it necessary, or humanly possible for him, in every case, to perform the duty in person.<sup>5</sup>

In general the courts have recognized that the President acts through the chiefs of the Departments and that their acts are, in the view of the law, his acts. In proper cases, also, the acts of subordinate officials will be con-

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<sup>4</sup> See Macy, *Party Organization and Machinery in the United States*; Ford, *Rise and Growth of American Politics*; *Proceedings of the American Political Science Association*, I, 47, article by Prof. J. T. Young, "The Relation of the Executive to the Legislative Power."

<sup>5</sup> *Williams v. United States*, 1 How. 290; 11 L. ed. 135.

sidered as the acts of a departmental head, and thus of the President.<sup>6</sup>

Where, however, from the nature of the case, or by express constitutional or statutory declaration, it is evident that the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else.<sup>7</sup>

The courts have laid down the general doctrine that where a power of supervision and direction is given to an administrative superior, this power may be exercised either by way of direct order, or by entertaining appeals from the acts of subordinates.<sup>8</sup>

Generally speaking, it has been held that no appeal lies to the President from the heads of the great Departments at Washington. This is upon the ground that the acts of these administrative chiefs are held to be the acts of the President. It may be observed, however, that in the several States of the Union the heads of the administrative departments have, commonly, no powers of direction, and, therefore, that there is no general right of appeal to them.

### **Administrative decentralization in the States**

In general it may be said that the administrative systems of the States are much less centralized than that of the United States. As contrasted with the Federal system the governors have no general power of removal of public agents from office, nor are they given supervisory

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<sup>6</sup> *Wilcox v. Jackson*, 13 Pet. 498; 10 L. ed. 264; *Jones v. United States*, 137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691.

<sup>7</sup> *Runkle v. United States*, 122 U. S. 543; 7 Sup. Ct. Rep. 1141; 30 L. ed. 1167.

<sup>8</sup> *Knight v. United States Land Assn.*, 142 U. S. 161; 12 Sup. Ct. Rep. 258; 35 L. ed. 974; *Orchard v. Alexander*, 157 U. S. 372; 15 Sup. Ct. Rep. 635; 39 L. ed. 737.

or directory power over the various administrative departments and boards of the State governments. Furthermore each of these several departments and boards is thus not only not integrated into a single system under a single head, but, not infrequently each of them individually exhibits slight administrative integration.

### **Increasing integration of Federal administration**

The Federal administrative system has exhibited a steady increase in integration. In the earlier years subordinate administrative officials were accustomed to act in individual cases without feeling themselves bound to consult the judgment of those higher in office, nor did they hold themselves necessarily bound by directions from such sources. The principle followed by them was that they, as well as those in higher position, derived their authority by direct grant from the Congress and were subject to control and direction only by that body or by the courts. The necessities of efficient government have, however, compelled Congress to place express powers of control over their subordinates in the hands of administrative chiefs, and have persuaded the courts to recognize, whenever possible, the existence of these supervisory powers even where express statutory provision has not been made for their exercise.<sup>9</sup>

The power of the President to control the institution and continuance of suits by the Attorney-General and his assistants may seem to some an improper one, but its existence has been recognized since the foundation of the government.

### **Information to Congress**

The constitutional obligation that the President "shall from time to time give to the Congress information of the

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<sup>9</sup> Cf. Goodnow, *American Administrative Law*, 142.



State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," has, upon occasions, given rise to controversies between Congress and the President as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.

### **The President's control of foreign relations**

In the chapter dealing with the Treaty-making Power, the extent of the President's control of the foreign relations of the United States is fully considered.

### **The veto power of the President**

The exercise by the President of the veto power has given rise to very few constitutional questions, and, where these have arisen, they have been considered, incidentally, elsewhere in this treatise.

### **The President's pardoning power**

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

This pardoning power, like the veto power, has given rise to very few constitutional questions. It will be seen that the power is limited to offenses against the United States. Cases of impeachment are expressly excepted from its reach and we shall later consider whether it may extend to the remission of penalties imposed for civil contempts of court.

The effect of a pardon is to obliterate the offense, but it does not operate to impair the rights of others, as for

example, to restore the offender's property which has been forfeited;<sup>10</sup> nor does it restore one *ipso facto* to a forfeited office.<sup>11</sup> Also, though the pardon takes away the guilt, it does not effect the *fact* of conviction of the crime, which fact may be later shown as bearing upon the offender's character.

The power to pardon includes the right to remit part of the penalty as well as the whole, and in either case may be made conditional. The power may be exercised at any time after the offense has been committed, that is, either before, during, or after legal proceedings for punishment.<sup>12</sup> General pardons, granting amnesty to classes of offenders, without naming them individually, may be granted.

The power is a purely discretionary one in the President, and therefore may not in any way be limited by Congress.<sup>13</sup>

Though Congress has thus no power to limit in any way the exercise of the pardoning power by the President, it may itself exercise that power to a certain extent, if exercised prior to conviction. Thus acts of amnesty have been held valid.<sup>14</sup>

The power to suspend sentence, it has been held, is by the common-law inherent in the judicial power, and its exercise, therefore, would not be in conflict with the executive power to grant reprieves and pardons, even were that power considered exclusive.

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<sup>10</sup> *Osborn v. United States*, 91 U. S. 474; 23 L. ed. 388.

<sup>11</sup> *Ex parte Garland*, 4 Wall. 333; 18 L. ed. 366.

<sup>12</sup> *Idem*.

<sup>13</sup> *Idem*.

<sup>14</sup> *Brown v. Walker*, 161 U. S. 591; 16 Sup. Ct. Rep. 644; 40 L. ed. 819. As to remission of penalties by lower administrative officers, see *Pollock v. Bridgeport Co.*, 114 U. S. 411; 5 Sup. Ct. Rep. 881; 29 L. ed. 147.

## CHAPTER L

### THE APPOINTMENT AND REMOVAL OF OFFICERS

#### **Constitutional provisions**

The Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

It is also provided that the President "shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," and that he "shall commission all officers of the United States."

#### **"Officer" of the United States defined**

The definition of the term "officer" of the United States has been determined in *United States v. Germaine*<sup>1</sup> and *United States v. Mouat*.<sup>2</sup> In the latter case the court say: "Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized to make such appointment,

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<sup>1</sup> 99 U. S. 508; 25 L. ed. 482.

<sup>2</sup> 124 U. S. 303; 8 Sup. Ct. Rep. 505; 31 L. ed. 463.

he is not, strictly speaking, an officer of the United States."<sup>3</sup>

The Constitution, it is seen, fixes absolutely the manner in which certain officers: namely, ambassadors, other public ministers and consuls, and judges of the Supreme Court, shall be nominated and appointed. The Constitution itself provides, in other clauses, for the selection of the President, the Vice-President, presidential electors, Senators, members of the House of Representatives, and the officers of the two Houses of Congress. In addition to these officers whose selection is thus constitutionally determined, it would appear that all other officers not properly to be styled "inferior" are to be nominated by the President and appointed by and with the consent of the Senate. The appointment of all other officers of the United States, not mentioned within the foregoing classes, is subject to regulation by law of Congress, at least to the extent that that body may determine whether they shall be appointed by the President with the approval of the Senate, or by the President alone, or by the courts of law or the heads of the departments.

### **Inferior officers**

The Constitution does not define the term "inferior officers," but it would appear that in this class are included all officers subordinate or inferior to those officers in whom other appointments may be vested. The point has never been squarely passed upon by the court since Congress has never attempted to regulate the appointment to any but distinctly subordinate and inferior positions. Should it attempt to determine by the law the appointment of heads of the great departments, or of the

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<sup>3</sup> That members of Congress are not "officers" of the United States Government, see *Burton v. United States*, 202 U. S. 344; 26 Sup. Ct. Rep. 688; 50 L. ed. 1057.

heads of bureaus and divisions and commissions, or even of important local officers, such as revenue officers or postmasters in the larger cities, the constitutionality of the law would undoubtedly be subjected to judicial examination.

### **Nominations**

With reference to the President's power of appointment it is to be observed that nominating, appointing, and commissioning to office are distinct acts.

The nomination is exclusively in the hands of the President. During the first years of the Government the suggestion was several times made that the Senate might propose names for nomination to the President; but, whenever made, the suggestion was disapproved of as clearly not warranted by the Constitution. An appointment to office is not completed until the commission is signed. Therefore, even after sending a nomination to the Senate and even after the approval of that body has been given, the President may, having changed his mind, refuse his signature to a commission. His signature having once been appended, however, the appointment is complete, and the delivery of the commission by the head of the appropriate executive department may be commanded by mandamus, provided, of course, a Federal court has, by statute, been granted jurisdiction to issue the writ.<sup>4</sup>

### **Creation of offices**

All offices are created either by the Constitution itself, or by Congress. The President, therefore, has not the power to create an office by directing some person to perform certain functions. However, the President as well as other executive officials may, for their assistance in executing their official duties, employ persons to perform cer-

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<sup>4</sup> *Marbury v. Madison*, 1 Cr. 137; 2 L. ed. 60.

tain specific duties. These persons have, however, legally speaking, no official powers, that is, they have no authority to issue orders to others, and for compensation for their services they must look either to contingent funds, the expenditure of which is placed in the discretion of the department employing them, or to a subsequent appropriation by Congress.

Congress has no appointing power, beyond the selection of its own officers. It may create an office but not designate the one to fill it.<sup>5</sup>

It has been held that Congress may authorize a particular person or official to perform a specific act, though it may not create an "office" for that person, in the sense that he is made an officer of the United States or entitled to any emolument or profit.<sup>6</sup>

The Congress may not vest the appointment of officers elsewhere than as permitted by the Constitution, that is, elsewhere than in the President alone, the President and the Senate or the heads of departments.<sup>7</sup>

### Civil Service requirements

The question has been at times raised as to the constitutional power of Congress, while providing for the appointment of officials by the President, or by the heads of the departments, to require that the appointees shall be selected from certain classes or persons, namely, those who have satisfied specified educational and other tests applied by the Civil Service Commission. Though the courts have never had occasion to pass upon this point, the constitu-

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<sup>5</sup> *United States v. Ferreira*, 13 How. 40; 14 L. ed. 42. But see *Shoemaker v. United States*, 147 U. S. 282; 13 Sup. Ct. Rep. 361; 37 L. ed. 170.

<sup>6</sup> *Kentucky v. Dennison*, 24 How. 66; 16 L. ed. 717.

<sup>7</sup> *Ekiu v. United States*, 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146.

tionality of the provision would seem to be fairly certain. The same sort of rules have long been established and followed with reference to appointments in the army and navy, and the decisions of the State courts support the practice as to the appointment of State officials.

### **The power of removal**

Though the Supreme Court has never had occasion to pass squarely upon the point, executive practice, and, with the exception of the tenure of office acts of 1867 and 1869, Congressional enactment, have sanctioned the view that the power to remove from Federal office is constitutionally inherent in the President as to all offices to which he alone, or in conjunction with the Senate, appoints.<sup>8</sup>

### **Congress may regulate the removal of inferior officers**

In *United States v. Perkins*<sup>9</sup> it was held that when Congress by law vests the appointment of inferior officers in the heads of departments, it may at the same time limit and restrict the power of removal.

### **Injunctions to prevent removal**

In *White v. Berry*<sup>10</sup> it was held that, at least in the absence of express statutory authorization, the courts will not grant a writ of injunction to prevent the removal of an officer from the classified service, even though such removal be in violation of the rules governing that service, as laid down by the Civil Service Act and as embodied in an executive order issued in pursuance thereof. In

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<sup>8</sup> *Parsons v. United States*, 167 U. S. 324; 17 Sup. Ct. Rep. 880; 42 L. ed. 185; *Ex parte Hennen*, 13 Pet. 230; 10 L. ed. 138; *Reagan v. United States*, 182 U. S. 419; 21 Sup. Ct. Rep. 842; 45 L. ed. 1162; *Shurtleff v. United States*, 189 U. S. 311; 23 Sup. Ct. Rep. 535; 47 L. ed. 828.

<sup>9</sup> 116 U. S. 483; 6 Sup. Ct. Rep. 449; 29 L. ed. 700.

<sup>10</sup> 171 U. S. 366; 18 Sup. Ct. Rep. 917; 43 L. ed. 199.

general, it is held that in the general executive power of the President is implied a power of removal from office, and that under this general power he may issue rules for the government of the executive departments with reference to removals, but that these rules are not imposed upon the President by law or by the Constitution, and that, therefore, if they be violated by the executive chiefs, with the President's approval, the person so deprived of office has no legal right to be reinstated.

### **Mandamus to reinstate in office**

In *Keim v. United States*<sup>11</sup> it was held that the action of the Secretary of the Interior in discharging a clerk in his department for incompetency was not subject to review in the courts either by mandamus to reinstate him or by compelling the payment to him of his salary.

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<sup>11</sup> 177 U. S. 290; 20 Sup. Ct. Rep. 574; 44 L. ed. 774.



## CHAPTER LI

### MILITARY LAW

#### **Military powers of the General Government**

Under the Articles of Confederation the General Government had not been granted adequate military authority. To it had been conceded by the States the power to "build and equip a navy." But for its land forces it was obliged to rely wholly upon requisitions made upon the States, each State being pledged to supply a quota in proportion to the number of its white inhabitants. The regimental officers of these forces were appointed by the States, only the general officers being appointees of the General Government. From these quotas the national forces were supplied. Over the militia bodies of the several States, the General Government was given no control whatever.

Under the present Constitution the Federal Government is given full power for the organization and maintenance of both the naval and land forces of its own, and a considerable authority over the State militia forces. The constitutional clauses in which these powers are granted are as follows:

"The Congress shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the

laws of the Union, suppress insurrections and repel invasions;

“To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.” The second article of amendment provides that “A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”

Other clauses of the Constitution give to the United States the power to exercise exclusive authority “over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;” “To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;” and “To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.”

There is thus apparent the purpose to equip the National Government with adequate military authority to maintain itself against enemies both domestic and foreign. Upon the other hand, while the States are not deprived of military authority necessary to maintain domestic order or to protect themselves against invasion, the maintaining of armed forces for any other purpose, or the engaging in foreign war, or entering into alliances that may lead to war, is forbidden. By Clause 3 of § X of Art. I is declared: “No State shall, without the consent of Congress, lay any duty of tonnage, keep any ships-of-war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war,

unless actually invaded, or in such imminent danger as will not admit of delay.”

Section IV of Art. IV declares that “The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or the executive (when the legislature cannot be convened) against domestic violence.”

### **Military law—Reference to members of the army and navy**

The Constitution provides, as has been seen, that Congress shall have the power to provide and to make rules for the government and regulation of the land and naval forces. It has also provided that the President “shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.”

Under these grants of power Congress has established an army and navy, and by laws, passed from time to time, has provided the rules by which the respective powers and duties of the officers and men constituting this military establishment are to be determined and exercised. Collectively these rules are known as the Military Laws of the United States.

### **Articles of war**

The chief of these military laws, so far as they relate directly to the duties and obligations of the individual soldier, are embodied in the so-called Articles of War, which constitute sections 1342 and 1343 of the Revised Statutes.

With the details of this considerable body of statutory law we are not here concerned. With its general character, and especially with its relations to the civil portions of the law of the land, we are, however, interested.

**Obligations assumed by enlistment**

By enrollment in the military forces of the United States, the individual assumes new obligations, and is subjected to certain forms of control to which he was not before subject. But he does not lose his right to the protection of the civil and criminal law, nor is he released from any of his obligations thereunder. Thus the enlisted soldier comes under an obligation to obey all the provisions of the military code, and for the violation of any one of them is subject to trial before a military court, a court-martial, and, upon conviction, to punishment ranging in severity from a small fine or short imprisonment to loss of life. In cases of urgency, which do not admit of delay, he may be summarily punished by order of his superiors, without even a court-martial being convened. Furthermore, if the act for which he is tried, convicted and punished by the military authorities, is also an offense against the general law of the State in which he is, he may be tried, convicted and punished by the civil authorities of that State. Still further, as we shall see, if, in the justification of his act, he sets up the command of his military superior, it must appear that that order was one which that officer had authority to give. Thus the soldier may at times find himself in the dilemma that if he refuse to obey the order of his military superior, he will receive immediate military punishment; whereas, if he obey it, he will later be held civilly and criminally liable in the ordinary courts. This dilemma, though easily conceivable, is not, in fact, often a serious one, for the soldier will not be held civilly and criminally responsible except in cases where he has grounds for knowing that the act ordered to be committed was not a proper one and not within the official power of his superior to command.

But, just as the individual soldier is still answerable in all respects to the non-military law of the State, so are his

superiors when giving commands, as are also the members of courts-martial and of other military tribunals, when trying him, and the persons by whom the orders of such tribunals are carried into effect; and if any act is by them ordered or committed which is not warranted by the law of the land, they may be held civilly and criminally responsible by the ordinary courts. Not even the order of the President himself, the constitutional commander-in-chief of the army and navy, if that order be without authority of law, is sufficient to justify the performance of the act commanded.<sup>1</sup>

In time of war, as we shall see, the powers of the military commander, in the control of his own men, and of the citizens of the State to which he belongs, are much broader than they are in time of peace, but it is still true that they are subject to the limitations which the civil law imposes. With respect to the persons and property of the enemy, however, he is subject only to the limitations which the laws of war, as determined by international usage, supply, and for violation of these he is responsible only to the military tribunals.

### Courts-martial

The tribunals in which those who violate the military laws are tried (except where urgency demands a more summary method) are termed courts-martial.

These tribunals are presided over by military officers detailed for the purpose. No provision is made either for presentment or indictment by jury. The constitutionality of this is expressly provided for by the Fifth Amendment to the Constitution which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a

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<sup>1</sup> *Little v. Barreme*, 2 Cr. 170; 2 L. ed. 243.

grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." There is no constitutional necessity for a trial jury in courts-martial. These tribunals are not parts of the judicial organization of the United States. According to English practice juries were never required in them, and it has never been questioned that they are not required by the Sixth Amendment.

The decisions of courts-martial acting within their jurisdiction both as to the parties and the subject-matter are not subject to review by the civil courts. In assuming jurisdiction, however, they, in a sense, act at their peril, for their authority may be examined into by the civil courts, and if no jurisdiction is found, all acts committed by them are trespasses, punishment and damages for which the civil courts will award and the executive officers enforce.

In *Tarble's case*, decided in 1872, was examined the right of a State court to inquire by writ of habeas corpus whether an individual is a member of the United States army or navy, and, therefore, subject, as such, to Federal military law. The court denies this right, and asserts that this is a question exclusively for the Federal civil courts to determine.<sup>2</sup>

#### **Jurisdiction of courts-martial over offenses which are also violations of the local civil law**

In *Coleman v. Tennessee*<sup>3</sup> the court says: "We do not call in question the correctness of the general doctrine . . . that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted,

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<sup>2</sup> 13 Wall. 397; 20 L. ed. 597.

<sup>3</sup> 97 U. S. 509; 24 L. ed. 1118.

or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction that the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee."

It is clear that there is here opportunity for conflict between the military and civil powers. Congress, however, has provided against these contingencies by giving the precedence in such cases to the civil courts.

**The power of Congress to vest in military tribunals exclusive jurisdiction over all offenses committed by military persons, including offenses which are also crimes against the civil law**

There is an *obiter dictum* upon this point in *Coleman v. Tennessee*. The point directly decided in that case was that a certain § (30) of the Enrollment Act had not, as a matter of fact, made the jurisdiction of the military tribunals over certain offenses committed by soldiers in the army exclusive of the State courts. But after deciding this in the negative the court add: "We do not mean to intimate that it was not within the competence of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States."

Whether or not, however, Congress has the constitutional power, except in time of war, to render the jurisdiction of military tribunals exclusive, as was suggested in *Coleman v. Tennessee*, would seem to be more doubtful; and when, if ever, that question is squarely presented to the Supreme Court, that tribunal may consider more carefully the possibility of the exaltation of the military over the civil authorities implicit in its *dictum* in the *Coleman* case.

In time of war, and especially upon the actual theatre of war, military courts have, without express legislative

authorization, exclusive jurisdiction over the members of the military forces.<sup>4</sup>

**Powers of the Commander-in-Chief of the army and navy**

The constitutional Commander-in-Chief of the army and navy of the United States, and of the militia of the several States, when called into the service of the United States, is the President.<sup>5</sup> Through, or under, his orders, therefore, all military operations in times of peace, as well as of war, are conducted. He has within his control the disposition of troops, the direction of vessels of war and the planning and execution of campaigns. With Congress, however, lies the authority to lay down rules governing the organization and maintenance of the military forces, the determination of their number, the fixing of the manner in which they shall be armed and equipped, the establishment of forts, hospitals, arsenals, etc., and of course, the voting of appropriations for all military purposes.<sup>6</sup>

With respect to many matters of detail Congress has delegated to the President and to his executive subordinates the promulgation of administrative orders for the government of the land and naval forces which it might constitutionally itself provide, but which in fact it is either impossible or unwise for it to attempt to do. All orders of the President, or of the Secretary of War issued under his authority whether given by virtue of his constitutional office as commander-in-chief or of his statutory powers have the full force of law.<sup>7</sup> But in all cases these orders must, if issued by virtue of authority congressionally given, pursue the terms of the granting statute; and if issued by virtue of his constitutional authority, be in

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<sup>4</sup> *Coleman v. Tennessee*, 97 U. S. 509; 24 L. ed. 1118.

<sup>5</sup> Const., Art. II, § 2, cl. 1.

<sup>6</sup> *Ex parte Milligan*, 4 Wall. 2; 18 L. ed. 281.

<sup>7</sup> *Smith v. Whitney*, 116 U. S. 167; 6 Sup. Ct. Rep. 570; 29 L. ed. 601.



accordance with the generally accepted principles of international law and custom. Where this is not done, they will not justify the acts of subordinates acting under them.

### **Declaration of war**

To Congress is expressly granted by the Constitution the power to declare war. By war is meant an armed conflict of a public nature, the parties to which are recognized as belligerents and as entitled to all the rights and subject to all the obligations which international law recognizes and imposes.

But war may come into existence as a fact without a formal declaration, and in the Prize Cases<sup>8</sup> the Supreme Court has held that this existence of war as a fact may be recognized by the President, in advance of Congressional declaration, and that he may thereupon take action, as, for example, the establishment of a blockade, which in time of peace he would not be constitutionally empowered to institute.

That no war can exist between the United States and a foreign State, except by the declaration of Congress there has never been any doubt. This declaration may, however, be, as in the case of the Mexican War, that a State of war exists, or one declaring that war shall be begun. The terms of such a declaration fix the exact date of the beginning of the war so far as concerns matters of municipal law, and is binding on the courts of the State issuing it. From the viewpoint, however, of other nations, such a declaration is not conclusive, the beginning of the war being a question of fact to be interpreted in the light of the general principles of international law.

### **The prosecution of war**

The constitutional power given to the United States

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<sup>8</sup> 2 Black, 635; 17 L. ed. 459.

to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal, and Congress may by law expressly authorize measures which the courts must recognize as valid even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus during the Civil War in certain cases provision was made by congressional statute for the confiscation of certain enemy property or land, though such confiscation was not in accordance with the general usage of foreign States.

Even in dealing with its own loyal subjects, the power to wage war enables the government to override in many particulars private rights which in time of peace are inviolable.

The power to wage war carries with it the authority not only to bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal.<sup>9</sup>

### **The organization and disciplining of the militia**

As has been seen, the "organizing, arming and disciplining of the militia," and the prescribing of the discipline for training them are expressly placed within the control of Congress. The actual training, however, of the militia, according to the discipline thus to be supplied by Congress, is kept within the hands of the State authorities. And, furthermore, to them is given in general the appointment of militia officers, and the entire government of the militia forces except when they have been called into the service of the General Government.

The present Federal law passed under the constitutional

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<sup>9</sup> *Stewart v. Kahn*, 11 Wall. 493; 20 L. ed. 176.

authority for "organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States," is that of May 27, 1908, amending the act of January 21, 1903.

### **The militia as an arm of the Federal Government**

The Constitution enumerates three purposes for aid in the effectuation of which the United States militia forces may be peremptorily called upon by the General Government. These are (1) to execute the laws of the Union, (2) to suppress insurrections, (3) to repel invasions.

The suppression of insurrections has been held to include the waging of civil war for the putting down of rebellion,<sup>10</sup> and the repelling of invasions to include the providing against an attempted or threatened invasion.<sup>11</sup> The President may, when calling upon the militia, apply to the governors of the States to give the necessary orders, or may issue his orders directly to the commanding officers of the militia.<sup>12</sup> When called into the Federal service, the militia comes under the same complete Federal control as the regular national forces, and of course subject to the rules and articles of war.

In *Martin v. Mott*<sup>13</sup> the doctrine was declared, which has not since been questioned, that the President is, by statute, sole judge as to whether an exigency has arisen calling for the use of the militia by the Federal authorities.

### **The use of the militia and Federal troops to suppress domestic disorder**

From the foregoing it is seen that in all cases in which the integrity or existence of the National Government is

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<sup>10</sup> *Texas v. White*, 7 Wall. 700; 19 L. ed. 227.

<sup>11</sup> *Martin v. Mott*, 12 Wh. 19; 6 L. ed. 537.

<sup>12</sup> *Houston v. Moore*, 5 Wh. 1; 5 L. ed. 19.

<sup>13</sup> 12 Wh. 19; 6 L. ed. 537.

attacked or threatened, or a resistance offered to the execution of its laws too great to be overcome by the ordinary agencies of government, the aid of the Federal troops or of the organized militia of the States may be at once called upon. In cases, however, of domestic violence within a State, directed against its laws and government, the Federal arm may extend help only when called upon by the State authorities.<sup>14</sup>

### **Military government**

In a previous chapter the special administrative law governing persons in the military service of the United States has been considered. We have now to speak of the law regulating the conduct of the national armed forces in the possession and government of particular territories.

As will later appear, military government may constitutionally exist either in time of peace or of war, and over domestic as well as over foreign territory.

### **Military government of foreign territory**

Military government of foreign territory by the armed forces of the United States may exist either as the result of hostile occupation in time of war, or by friendly international agreement, in time of peace. An instance of this last was the military occupation and administration of Cuba by the United States. The constitutional authority for thus employing our troops in foreign territory was derived not from the war powers of the President acting as the commander-in-chief of the army and navy, for there was no existing war, but from the general powers of the United States as a sovereign State in all that relates to international relations.

The law of military occupation of foreign territory is that established by general international law. According

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<sup>14</sup> *In re Debs*, 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

to this, the power of the military commander is constitutionally supreme. For no act that he or his subordinates may commit can he or they be held civilly liable in the civil courts of the United States or of the State whose territory is occupied. The only limits to the military authority are those which international law and usage, upon the ground of humanity and justice, impose, and breaches of these are cognizable only in the military courts.<sup>15</sup>

During military occupation of foreign territory, though there is no obligation by either constitutional or international law, to establish courts or to permit the continued operation of local courts for the trial of ordinary civil and criminal cases according to local law, there is nothing to prevent this being done, and in fact, in modern times, this is usually done. Indeed, the principle is now well established that, until expressly declared otherwise, local law and the tribunals for its administration, continue in operation. But in all such cases, the courts, whether established or allowed to continue, exist essentially as military courts, and the law which they enforce has validity only by military order and permission. For the first effect of military occupation is to sever, for the time being, all the former political relations of the inhabitants of the territory and to destroy the *de jure* character of the former organs of government.\*

In practically all respects the laws governing the military occupation of foreign hostile territory apply to the military occupation of hostile domestic territory in time of a civil war which has assumed a public character.

The fact that the sovereign State continues to claim sovereignty and to exercise powers as such does not pre-

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<sup>15</sup> *New Orleans v. N. Y. Mail Steamship Co.*, 20 Wall. 387; 22 L. ed. 354.

vent it from exercising at the same time all the rights of a belligerent. This was conclusively determined in the Prize Cases. In that case, as will be remembered, it was held that there lies within the discretion of the President as commander-in-chief of the army, a discretion not reviewable by the courts, to determine when an insurrection or civil war has assumed such proportions as to warrant him in declaring it to be public war, and the insurrectionists belligerents. When this is done, the war becomes a territorial one, and all inhabitants of the revolting district become *ipso facto* public enemies.<sup>16</sup>

The right of confiscation and other belligerent rights thus exercisable by the military authorities within the United States during civil war must, in every case, be authorized by some competent officer or tribunal acting under the sanction of an act of Congress. That is to say, the individual soldier or officer is not allowed individually, and without obtaining the decree of a competent military or other tribunal, to seize private property as a prize of war.<sup>17</sup>

### **Military government of domestic territory in times of peace**

Military governments established on foreign territory in time of war do not necessarily come to an end with the declaration of peace and the annexation of the occupied territory to the United States; and the same is true after the conclusion of peace of military governments established in insurrectionary domestic territory. But these governments, though military in character, rest upon a different basis, and have somewhat different powers from those maintained during war.

Military governments in time of peace, whether in

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<sup>16</sup> Mrs. Alexander's Cotton, 2 Wall. 404; 17 L. ed. 915; Miller v. United States, 11 Wall. 268; 20 L. ed. 135.

<sup>17</sup> Brown v. United States, 8 Cr. 110; 3 L. ed. 504.

territories newly annexed to the United States, or in districts lately in rebellion, no longer derive their authority from the President as commander-in-chief of the army and navy, but exist by the tacit or express command of Congress. Until Congress acts, the President may maintain military governments by virtue of the fact that he is commander-in-chief of the army and navy, and obligated to "take care that the laws be faithfully executed wherever the Federal sovereignty extends." Such governments as he may establish or continue in existence in annexed territory after the conclusion of war are, however, subject to the will of Congress either to change or abolish.

Illustrative of this principle were the military governments set up in the Southern States during and after the Civil War. While that war was in progress there was no question as to the power of the Executive to set up military governments in districts occupied by the Federal troops. With the conclusion of that war, however, Congress at once asserted its exclusive right to determine the manner in which the States lately in secession should be ruled until their civil status should be fully restored.

The right of Congress to maintain military governments in States of the Union after the restoration of peace was based partly on the ground of military necessity—that, though war had ceased, the results for which it had been waged were not yet fully secured—and partly on the ground that it lay with Congress to guarantee to the States loyal governments republican in form, and that to obtain these it was necessary for a time to furnish protection to the loyal portions of their populations.<sup>18</sup>

Though military in form the governments established or maintained by the President in time of peace in territories subject to the sovereignty of the United States may

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<sup>18</sup> *Texas v. White*, 7 Wall. 700; 19 L. ed. 227.

not be granted as complete a governing authority as that which they possess in time of war. The authority which may constitutionally be given to or exercised by them is determined by the purposes for which they exist. In time of war they have full power, legislative, executive, and judicial, to do anything the laws of war, as determined by international usage, permit to be done that will strengthen themselves or weaken the enemy. War having ended, however, and the territory become domestic, the powers of the military commander become simply administrative in character, and his acts, so far as the necessities of the case permit, are limited by the general and constitutional laws of the country under which he acts. He, in fact, no longer enjoys authority by virtue of belligerent right, but as an agent of the sovereign of the country for the establishment and maintenance of civil rights therein. As Magoon expresses it, he ceases to occupy the place of the suspended or expelled sovereignty, and becomes an instrument of the new sovereignty. He becomes the representative of sovereignty instead of a substitute.<sup>19</sup>

The powers of the military government in time of peace in domestic territory being simply those of a local administrative agent of the United States, are subject to two general limitations. First, being of an administrative character, they do not include general legislative power, that is, the authority to establish laws of more than strictly local effects; and, second, such powers as are possessed, are subject to the privileges and immunities created and guaranteed by the Constitution. How far these constitutional privileges apply to governments, whether military or civil, established in territories belonging to, but not "incorporated" into the United States, has been

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<sup>19</sup> *Reports on the Law of Civil Government in Territory Subject to Military Occupation*, p. 20.



considered in an earlier chapter. In all other domestic territory, whether in a Territory or a State lately in rebellion, these constitutional limitations apply, and the agents have, therefore, and can be endowed by Congress and the executive only with such powers as may be exercised at any time and in any place under the doctrines of "martial" as distinguished from "military law." In short, their extent is measured by the necessity for their exercise.<sup>20</sup>

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<sup>20</sup> *Raymond v. Thomas*, 91 U. S. 712; 23 L. ed. 434; *Dooley v. United States*, 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

## CHAPTER LII

### MARTIAL LAW

#### **Martial law defined**

In the most comprehensive sense of the term, Martial Law includes all law that has reference to, or is administered by, the military forces of the State. Thus it includes (1) Military Law Proper, that is, the body of administrative laws created by Congress for the government of the army and navy as an organized force; (2) the principles governing the conduct of military forces in time of war, and in the government of occupied territory; and (3) Martial Law *in sensu strictiore*, or that law which has application when the military arm does not supersede civil authority but is called upon to aid in the execution of its civil functions.<sup>1</sup> This last form of Martial Law, which is to be considered in this chapter, is to be sharply distinguished from those forms of Military Law which have been already considered.<sup>2</sup>

#### **Martial law a form of the police power**

That which brings martial law closely into relation with military law is the fact that it is administered by the armed forces of the State, and that it partakes, in a measure at least, of its absolute character. That is to say, under its control, certain of the guarantees to the individual against personal injury on the part of those in authority furnished by the civil law, are in abeyance. But in all other re-

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<sup>1</sup> *Ex parte Milligan*, 4 Wall. 2; 18 L. ed. 281.

<sup>2</sup> Chapter LI.

spects, as we shall see, martial law belongs in the field of civil rather than that of the military law. Indeed, martial law is essentially a branch of the police laws of the State, and its exercise is governed by the same principles as those which control the exercise of the so-called Police Powers of the State.<sup>3</sup>

### **Martial power limited**

However, as we have earlier seen, though there are necessarily many circumstances under which the political power, in behalf of public interests, may interfere with the freedom of action of the individual and the use by him of his own property, in no one of these instances may this interference be an arbitrary one. That is to say, in each case the propriety of the interference may be questioned by the individual, and, when so questioned, the official whose act constitutes the interference must be able to justify his act by referring to a valid law and to some consideration of public necessity or convenience. If a person is drafted into military service, there must have been enacted a valid drafting law, including within its application the class of persons to which the individual drafted belongs. If a contract formally valid is refused enforcement, it must be shown to be opposed to public policy. If property is taken under eminent domain it must be for a public use, and compensation must be given. If the rates charged by public service corporations are regulated by law, the regulation must be a reasonable one and not one, in its effect, confiscatory of private property. Finally, to constitute a valid exercise of the so-called police power of the State there must be shown some public advantage to be gained by thus interfering with the personal liberty and property rights of the individual.

Now, in exactly the same way in which the civil author-

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<sup>3</sup> See *ante*, p. 341.

ities may by law or through executive action control the activities of the individual and the use of his property in the interest of the public good, the military arm of a government may be employed to preserve the public peace and to secure the execution of the laws.

In European countries, living under written constitutions, provision is quite generally made for the declaration in times of danger of what is called a "state of siege," the effect of which is immediately to suspend the operation of all the ordinary constitutional limitations upon executive power. No similar status is known to American law. The use of the military arm of our States or of the Federal Government in time of peace and upon domestic soil to maintain order and secure the execution of law in no wise operates to suspend civil law or to negate the individual rights of liberty and property, any more than the ordinary exercise of the police powers of the State has this effect. The use of the military forces of a State for the maintenance of order and law is, indeed, not dissimilar in purpose and character to the employment by a sheriff of a *posse comitatus* to assist him in making an arrest, preventing an escape or serving a writ. In both cases those who exercise authority are obliged to justify whatever acts they may have committed by showing their necessity, or, at least, producing evidence to show that they had reasonable grounds for believing them to be necessary.

### **Martial law does not abrogate civil law and civil guarantees**

There is, then, strictly speaking, no such thing in American law as a declaration of martial law whereby military is substituted for civil law. So-called declarations of martial law are, indeed, often made, but the legal effect of these goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and

that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law.<sup>4</sup>

During the time that the military forces are employed for the enforcement of law, that is to say, when so-called martial law is in force, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the individual are suspended. The relations of the citizen to his State are unchanged. Whatever interference there may be with his personal freedom or property rights must be justified, as in the case of the police power, by necessity, actual or reasonably presumed. During times of disorder, such as lead to a call upon the military forces for assistance, necessity naturally demands the commission of acts which in more tranquil times are not demanded, and thus in fact, those in authority may control the individual and his property in ways which they could not legally do at other times, but the principle still holds good that necessity, and necessity alone, will justify an infringement upon private rights of person and property.

### **Martial law and military government distinguished**

It is thus seen that martial rule, that is, the use of the military arm for the enforcement of civil law, is something quite different from the establishment of military government over territory conquered in public war. Mr. Magoon draws this distinction admirably in the following words: "A military government," he says, "takes the place of a suspended or destroyed *sovereignty*, while martial law, or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which

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<sup>4</sup> *Ela v. Smith*, 5 Gray (Mass.), 121.

remains subject to the sovereignty. The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion. The occasion of martial rule is simply public exigency which may arise in time of war or peace. A military government, since it takes the place of a deposed sovereignty, of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions.”<sup>5</sup>

It is to be observed before leaving this point that, so far as regards the acts that may be done by military and civil authorities in effectuating their purposes, the necessity for them being present, there is no difference between the commander's powers in a domestic insurrection and in a war. As the Supreme Court of Pennsylvania in a recent case has said: “In truth he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of the parties aggrieved.”<sup>6</sup>

### **Martial law in time of war**

Thus far the discussion has related to martial rule as exercisable in time of peace, that is, in times when, to be sure, civil disorder prevails, but when war—public war—

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<sup>5</sup> *Reports on the Law of Civil Government in Territories Subject to Military Occupation.*

<sup>6</sup> *Wadsworth v. Shortall*, 206 Pa. St. 165. See, also, *Moyer v. Peabody*, 212 U. S. 78; 29 Sup. Ct. Rep. 235; 53 L. ed. 410.

does not exist. We have now to speak of martial rule when this latter condition is present.

It has already been learned that in war the enemy, be he a foreign one, or a rebel to whom the status of belligerent has been given, has no legal rights which those opposed to him must respect.

When a civil contest becomes a public war, all persons living within limits declared to be hostile become *ipso facto* enemies, and subject to treatment as such.<sup>7</sup>

Different conditions prevail, however, in loyal districts. In these the existence of war does not operate to destroy or suspend the civil rights of the inhabitants.

Upon the actual scene of war, there is no question that, for the time being, the military authorities are supreme, and that these may do whatever may be necessary in order that the military operations which are being pursued may succeed. Here martial law becomes indistinguishable from military government. "When martial law is invoked in face of invasion or rebellion that rises to proportions of belligerency, it is war power pure and simple." It is in this sense that Field defines martial law as "simply military authority exercised in accordance with the laws and usages of war," and the Supreme Court defines it as "the law of necessity in the actual presence of war."<sup>8</sup>

The necessities being great and extraordinary, the executive and administrative, that is to say, the military, action that will be justified is correspondingly extensive. But, the populace being loyal, and the territory domestic, private rights of persons and property still persist, though subject, as in all other cases, to the exercise of the police powers of the State. Those who exercise these powers, though military in character, still remain liable for any

<sup>7</sup> Ford v. Surget, 97 U. S. 594; 24 L. ed. 1018.

<sup>8</sup> United States v. Dickelman, 92 U. S. 520; 23 L. ed. 742.

abuse of their authority. The civil courts are not necessarily closed, nor are any of the private actions of individuals subject to restraint except in so far as the efficiency of public service may require.

Private property may be seized and appropriated to a public use without the consent of the owner, when the public necessity demands. This taking of private property is, however, the courts have declared, not an exercise of military power which gives to the owner no claim for compensation, but a taking for the public use which, under the provision of the Fifth Amendment, demands that compensation be made. The manner of taking, however, may be that of the police power in that the urgency may not permit the ordinary proceedings for valuation and condemnation.<sup>9</sup>

#### **Exercise of military authority outside the immediate theatre of war—Ex parte Milligan**

Under the stress of military exigency, upon the actual theatre of war such civil guarantees as the writ of habeas corpus, immunity from search and seizure, etc., may, of course, be suspended. As to this there is no question. There is, however, a serious question whether, when war exists, these rights may, by legislative act or executive proclamation, be suspended in regions more or less remote from active hostilities. This question was raised and carefully considered in the famous Milligan case<sup>10</sup> in which the Supreme Court was called upon to pass upon the authority of a military commission, during the Civil War, to try and sentence upon the charge of conspiracy against the United States Government one Milligan, who was not a resident of one of the rebellious States, nor

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<sup>9</sup> *United States v. Russell*, 13 Wall. 623; 20 L. ed. 474. See, also, *Mitchell v. Harmony*, 13 Wall. 115; 14 L. ed. 75.

<sup>10</sup> *Ex parte Milligan*, 4 Wall. 2; 18 L. ed. 281.



a prisoner of war, nor ever in the military or naval service of the United States, but was at the time of his arrest a citizen of the State of Indiana in which State no hostile military operations were then being conducted.

The military commission had been created pursuant to an act of Congress of March 3, 1863, authorizing the suspension of the writ of habeas corpus throughout the United States by the President, but providing that lists of persons, not prisoners of war, held under military authority should be furnished within a given time to the judges of the Federal circuit and district courts, and that one so imprisoned whose name was not so reported might appeal for release to the civil courts.

Five of the justices of the Supreme Court held that Congress was without the constitutional authority to suspend or authorize the suspension of the writ of habeas corpus, and to provide military commissions in States outside the sphere of active military operations and with their civil courts open and ready for the transaction of judicial business. The remaining four justices held that Congress had not in fact made legislative provision for the military tribunal in question, but asserted that it possessed the constitutional authority so to do, should it see fit.

There would seem to be but little question that the doctrine stated by the majority in the Milligan case is essentially a sound one, namely, that actual necessity and not constructive necessity as determined by legislative declaration, alone will furnish justification for substituting martial for civil law. It would seem, however, that in one respect the opinion is open to criticism. The statement is too absolutely made that "martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

It is correct to say that "the necessity must be actual and present," but it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly point out, there may be urgent necessity for martial rule even when the courts are open. The better doctrine, then, is not for the court to attempt to determine in advance with respect to any one element, what does, and what does not create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption.

### **Habeas corpus**

The writ of habeas corpus *ad subjiciendum* is one of a number of so-called extraordinary judicial writs, which like those of certiorari, quo warranto, mandamus and injunction are issued by the courts either in order that their commands may be executed, or that a matter may be brought before them for judicial determination. This especial writ, often termed "the writ of liberty," had become one of the established rights of the citizen before the separation of the American colonies from the mother country, and has ever since been regarded by American citizens as the greatest of the safeguards erected by the civil law against arbitrary and illegal imprisonment by whomsoever the detention may be exercised or ordered. Issued as of right by any court of competent jurisdiction, it orders those to whom it is directed to show good legal justification for holding in custody the person in whose favor it is given. Where such sufficient cause is not shown, an order of release follows as of course.

### Suspension of the writ

The United States Constitution declares that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." The implication from this language is that the writ shall not be suspended, except in the cases mentioned. The prohibition is directed only to the Federal Government. Aside, therefore, from the specific provisions of their several constitutions, the States are free to suspend the writ, but in case they do so and without sufficient excuse, the person detained may of course, obtain the writ from a Federal court under the claim that he is deprived of liberty without due process of law or in derogation of some other Federal right, privilege or immunity.

The suspension of the privilege of the writ, it is to be observed, does not deprive the courts of the right to issue it. It furnishes merely a legal ground for a refusal to obey it.<sup>11</sup>

Furthermore, the suspension of the writ goes no further than to justify this refusal. It thus enables executive agents to make arrests at will, and, while the suspension is in force, renders it impossible for those apprehended to obtain a judicial judgment upon the legality of such arrests and detention. But it does not operate actually to authorize such arrests, or to deprive the individual of any of the other rights which the law secures him, and, therefore, the persons responsible for the arrests and detentions may still be held civilly and criminally responsible for any illegal acts that they may have committed. In time of war, or of domestic disorder or insurrection, when so-called martial law has been declared, the privilege of the writ of habeas corpus, together with all the other civil

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<sup>11</sup> *Ex parte Vallandigham*, 1 Wall. 243; 17 L. ed. 589.

guarantees may, for the time being, be suspended; but, as we have already learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this.

The existence of civil war operates as regards the enemy *ipso facto*, that is, without formal declaration, as a suspension of the privilege of the writ of habeas corpus, together with, as said, the suspension of the other guarantees to the individual against arbitrary executive action. In the preceding chapter the principle was sustained that the establishment of martial law may properly take place not only upon the theatre of active hostilities, but elsewhere when the actual necessities of the case demand it.

The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law. The same reasoning, therefore, that was employed with reference to this latter subject is applicable to the question of the suspension of the writ of habeas corpus, and need not here be repeated.

### **Power of the President to suspend the writ**

In *Ex parte Bollman* <sup>12</sup> the Supreme Court in its opinion took for granted that the power of suspension lay with Congress, and the same view was held by Story in his *Commentaries*.<sup>13</sup>

The correctness of this view does not appear to have been questioned until the early period of the Civil War, when President Lincoln, upon the advice of his Attorney-General, declared that the power lay with him, and by various proclamations authorized the suspension of the

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<sup>12</sup> 4 Cr. 75; 2 L. ed. 554.

<sup>13</sup> § 1336.

writ in places both within and without the area of active hostilities.

The rightfulness of this assumption of power by the President was severely criticised notwithstanding the arguments of the Attorney-General and of the eminent jurist Horace Binney. This criticism was judicially expressed by Chief Justice Taney in a protest which he filed in the case of *Ex parte Merryman*.<sup>14</sup>

In that case obedience to a writ which he had issued being refused by a military officer of the United States, acting under the authority of the President, Taney recognized his inability to compel its execution and filed a protesting opinion in the course of which, after calling attention to the fact that the constitutional provision providing for the suspension of the writ is found in the article which is devoted to the legislative department and is, therefore, to be presumed to relate to the powers of Congress, he said: "The only power, therefore, which the President possesses, where the 'life, liberty or property' of a citizen are concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws are faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come to the aid of the judicial authority if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm. But in exercising this power he acts in subordination to judicial authority, assisting it to execute the process and enforce its judgments."

<sup>14</sup> *Taney's Reports*, 246.

“With such provision in the Constitution, expressed in language too clear to be misunderstood by any one,” said Taney, “I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of habeas corpus or arrest a citizen except in aid of the judicial power.”

That Taney’s reasoning is correct there would now seem to be little question. The point has never since been squarely passed upon by the courts, but in 1863 Congress considered it necessary specifically to authorize the President to suspend the writ, and commentators now agree that the power to suspend or authorize the suspension lies entirely in Congress.<sup>15</sup>

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<sup>15</sup> Cf. Winthrop, *Military Law*, and Tucker, *Constitution of United States*, II, pp. 642-652.

## CHAPTER LIII

### THE SEPARATION OF POWERS

#### **The separation of powers**

A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative and judicial powers is to be vested in separate and independent organs of government. The value of this principle or practice in protecting the governed from arbitrary and oppressive acts on the part of those in political authority, has never been questioned since the time of autocratic royal rule in England. That the doctrine should govern the new constitutional system established in 1789 was not doubted.

#### **Separation of powers in the States not compelled by the Federal Constitution**

It is to be observed that this general acceptance by the States of the principle of the separation of powers is not one forced upon them by Federal law,<sup>1</sup> except in so far as the prohibition of the Fourteenth Amendment with reference to the depriving any person of life, liberty or property without due process of law is operative, or possibly, in extreme cases, where it might be held that the government is not republican in form. Nor, as we shall later see, do the distributing clauses in the State constitutions operate to prevent the consolidation of judicial,

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*Calder v. Bull*, 3 Dall. 386; 1 L. ed. 648.

executive and legislative powers in local governmental organs.<sup>2</sup>

### **Powers separated in the Federal Government**

The Federal Constitution does not contain a specific distributing clause, but its equivalent is found in the clauses which provide that "all legislative power herein granted shall be vested in a Congress of the United States," that "the executive power shall be vested in a President of the United States of America," and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

These provisions, interpreted in the light of the accepted doctrines that each and all of the Federal organs of government possess only those powers granted them by the Constitution, and that the powers not granted may not by them be delegated to other and different organs, have, from the beginning, been held to secure what the specific distributing clauses in the State constitutions are designed to provide.<sup>3</sup>

To preserve the separation of powers and to render government efficient for the protection of civil liberty, the framers of our Federal and State constitutions saw that it was necessary not simply to create separate depositaries for the three powers, but to provide efficient means for preventing, if possible, the control by one department of the other departments. With this end in the view, the executive, legislative and judicial establishments are made as independent as possible of one another. Thus the legislatures are made the sole judges as to the constitutional qualifications of those claiming

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<sup>2</sup> Goodnow, *American Administrative Law*, p. 35.

<sup>3</sup> *Kilbourn v. Thompson*, 103 U. S. 168; 26 L. ed. 377.



membership, they have the power of disciplining and expelling members, their members are in general not liable to arrest except for felony, treason, or breach of the peace, and they may not be held responsible in actions of slander or libel for words spoken or printed by them as members. The independence of the courts is in general secured by tenures of office, and official compensation free from legislative control, and, furthermore, they have the great power of declining to recognize as valid all laws or executive acts which they hold to be unconstitutional or otherwise illegal. The executive has, of course, within his own hands, the material force of the State, and within the limits of the discretion placed by law in his hands, may not be held legally responsible in the courts for his acts.

### **Separation of powers not complete**

While, as has been said, the principle of the separation of the powers has generally been accepted as binding in our systems of constitutional jurisprudence—State and national—the practical necessities of efficient government have prevented its complete application. It has from the beginning been necessary to vest in each of the three departments of government certain powers, which, in their essential nature, would not belong to it. Thus, to mention only a few of the more evident examples, the courts have been given the essentially legislative power to establish rules of practice and procedure, and the executive power to appoint certain officials—sheriffs, criers, bailiffs, clerks, etc., the executive has been granted the legislative veto power, and the judicial right of pardoning; the legislature has been given the judicial powers of impeachment, and of judging of the qualifications of its own members, and the Senate, the essentially executive power of participating in the appointment of civil officials.

Not only this, but as we shall later see, the principle of the separation of powers does not prevent the legislative delegation to executive officers of both a considerable ordinance-making power, and an authority to pass, with or without an appeal to the courts, upon questions of fact. Essentially, the promulgation of administrative ordinances or orders is legislative in character, and the determination of facts after a hearing is judicial. In both cases, however, these functions are performed in pursuance of statutory authority, and as incidental to the execution of law. In like manner, the legislature is conceded to have, as incidental to its law-making power, the essentially judicial function of punishing for contempt or disobedience to its orders.

### **The general principle stated**

Thus it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.

From the rule, as thus stated, it appears that in very many cases, the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate

functions of the department into whose hands its exercise has been given.

Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.

### **Declaratory and retroactive legislation**

Declaratory statutes, that is, those legislative pronouncements as to how certain laws, previously established, are to be interpreted in courts and by executive agents, are valid in so far as they are designed to govern future action.<sup>4</sup>

Retroactive legislation which does not impair vested rights, or violate express constitutional prohibitions, is valid, and, therefore, particular legal remedies, and, to a certain extent, rules of evidence, may be changed and, as changed, made applicable to past transactions, for it is held that, so long as the general requirements of due process of law are satisfied, no person has a vested right in any particular legal remedy or mode of judicial procedure.

Again, in certain cases, the legislature is competent to validate proceedings otherwise invalid because of formal irregularities. But substantive rights may not thus be interfered with.

### **Legislative control of judicial procedure and powers**

The power of the courts to refuse to apply legislative acts inconsistent with constitutional provisions has already been considered. This is as far as the courts will go in the control of the legislative department. They do not possess and have never been claimed to possess the power to pass upon the credentials of one claiming

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<sup>4</sup> Cf. Cooley, *Constitutional Limitations*, 7th ed., p. 137.

membership in a legislative body. They do not attempt to prescribe the rules by which such bodies are governed in the conduct of their work, and, to only a very limited extent, will they question the correctness of the legislative records that are kept. Finally, they never attempt to command or prohibit the performance of a legislative act. Individually, however, the members of a legislature are, of course, subject to judicial process, except so far as they have been granted express immunity by the Constitution.

Upon the other hand, as we shall see, the courts have not hesitated to protect their own independence from legislative control, not simply by refusing to give effect to retroactive declaratory statutes, or to acts attempting the revision or reversal of judicial determinations, but by refusing themselves to entertain jurisdiction in cases in which they have not been given the power to enforce their decrees by their own writs of execution. Thus they have refused to act where their decisions have been subject to legislative or executive revisions. Finally, even where the extent of their jurisdiction, both as to the parties litigant and subject-matter, has been subject to legislative control, the courts have not permitted themselves to be deprived of the power necessary for maintaining the dignity, the orderly course of their procedure, and the effectiveness of their writs.

In order that a court may perform its judicial functions with dignity and effectiveness, it is necessary that it should possess certain powers. Among these are the right to issue certain writs, called extraordinary writs, such as mandamus, injunction, certiorari, prohibition, etc., and, especially, to punish for contempt and disobedience to its orders. The possession of these powers the courts have jealously guarded, and in accordance with the constitutional doctrine of the separation and independence

of the three departments of government, have held, and undoubtedly will continue to hold, invalid any attempt on the part of the legislature to deprive them by statute of any power the exercise of which they deem essential to the proper performance of their judicial functions. The extent of their jurisdiction, they argue, may be more or less within legislative control, but the possession of powers for the efficient exercise of that jurisdiction, whether statutory or constitutional, which they do possess, they cannot be deprived of.

### **Jurisdiction and judicial power distinguished**

It has been already pointed out that the jurisdiction of the inferior Federal courts and the appellate jurisdiction of the Supreme Court are wholly within the control of Congress, depending as they do upon statutory grant. It has, however, been argued that while the extent of this jurisdiction is thus within the control of the legislature, that body may not control the manner in which the jurisdiction which is granted shall be exercised, at least to the extent of denying to the courts the authority to issue writs and take other judicial action necessary for the proper and effective execution of their functions. In other words, the argument is, that while jurisdiction is obtained by congressional grant, judicial power, when once a court is established and given a jurisdiction, at once attaches by the direct force of the Constitution.

### **Contempts**

Within recent years the question of the constitutional extent of the legislative control over the powers of the courts has been discussed with special reference to the regulation of the courts' power to punish for contempt, and to issue writs of injunction.

That, generally speaking, the power to punish for con-

tempt is inherent in courts is beyond question. It may, however, be argued that where the existence and jurisdiction of a court are wholly within the control of the legislative body, as is the case with the inferior Federal courts, authority exists in the legislature to determine the circumstances under which contempt may be held to have been committed, the form of trial therefor and the punishment which, upon conviction, may be inflicted. The power has, indeed, in a measure, been exercised by Congress which by law of March 2, 1831, limited the contempt powers of the Federal courts to three classes of cases: (1) Those where there has been misbehavior in the presence of the court, or so near thereto as to interfere with the orderly performance of its duties; (2) where there has been misbehavior by an officer of the court with reference to official transactions; and (3) where there has been disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court.

The constitutionality of this law does not seem to have been questioned, but it may well be questioned whether it could constitutionally be held to control the Supreme Court which derives its existence and much of its jurisdiction directly from the Constitution.

### **Pardoning powers of the President and contempts**

Arguing from the general principle of the independence of the three departments of government it would seem that the question as to the power of the President to pardon persons adjudged by one of the Federal courts to be in contempt should be answered in the negative, for clearly to give this power to the executive is to place in his hands a weapon with which he may completely nullify the court's power to enforce its decrees. To this it may be replied, however, that, having the direction of the armed forces of the nation he has the power in any event,

and the Constitution vesting in him the general power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," it would seem to follow that the power to remit the punishment of those convicted of contempt by the Federal courts is given.

With reference to this, however, there is a distinction to be made between criminal and so-called civil contempts.<sup>5</sup> In civil contempts the defendant is fined or imprisoned in order to obtain for a suitor his private rights. Punishment for criminal contempts, upon the other hand, is imposed to uphold and vindicate the dignity of the court. Though the Supreme Court has never passed directly upon this point, there would seem to be no doubt that the pardoning power of the President extends at least to persons punished for criminal contempts.<sup>6</sup>

### **Power of Congress to punish for contempt**

In 1821 the Supreme Court by a decision rendered in the case of *Anderson v. Dunn*<sup>7</sup> recognized the existence in Congress of a general power to punish for contempt persons disobeying its orders, especially those with reference to the giving of testimony and the production of papers before its committees and commissions of inquiry. In the case of *Kilbourn v. Thompson*,<sup>8</sup> however, decided in 1881, the court very much narrowed this power, holding that Congress had the power to compel information only with reference to matters over which it had legislative power, and that, therefore, it might not punish for contempt a refusal to testify or produce papers bearing upon other subjects. In this respect, being a legislature of

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<sup>5</sup> *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418; 31 Sup. Ct. Rep. 492; 55 L. ed. 797.

<sup>6</sup> See *In re Nevitt*, 117 Fed. Rep. 448; 3 Op. Atty. Gen. 662; 4 Op. Atty. Gen. 458; *Columbia Law Review*, III, 45.

<sup>7</sup> 6 Wh. 204; 5 L. ed. 242.

<sup>8</sup> 103 U. S. 168; 26 L. ed. 377.

limited powers, Congress could not measure its powers by those exercised by the English Parliament.

That Congress has the power to punish its own members for disorderly behavior, that it may punish by imprisonment a refusal to obey a rule made by it for the preservation of its own order, and inflict penalties in order to compel the attendance of absent members, has not been questioned. In the case of *Re Chapman*,<sup>9</sup> however, decided in 1897, was raised the question whether it had the authority to punish a refusal to testify before a committee which was inquiring, not with regard to proposed legislation, but with reference to the truth of charges which had been made reflecting upon the integrity of certain of its members. This power the court upheld.

The court, furthermore, held in this case that having the power, Congress might, instead of or in addition to itself punishing for contempt, provide by law that a contumacious witness be indicted and punished in the courts for a misdemeanor.

With reference to the authority of the State legislatures to punish for contempt it may be observed that their powers are much broader than those of Congress. Possessing all powers not expressly or impliedly refused them, they have a general inquisitorial power and a corresponding general authority to punish a refusal to testify or to produce papers.

### **The performance of administrative acts by the courts**

Courts have no hesitation in performing ministerial acts, if such acts are incidental to the exercise of their proper judicial functions. But they will not perform administrative acts not so connected.<sup>10</sup>

<sup>9</sup> 166 U. S. 661; 17 Sup. Ct. Rep. 677; 41 L. ed. 1154.

<sup>10</sup> *Hayburn's Case*, 2 Dall. 409; 1 L. ed. 436; *United States v. Ferreira*, 13 How. 40; 14 L. ed. 42; *Gordon v. United States*, 2 Wall. 561; 17 L. ed. 921.



### **Judicial review of administrative determinations**

Though, as the foregoing cases show, the courts will not consent to exercise jurisdiction where their decisions are reviewable by administrative officials, they have not refused themselves to review decisions rendered in the first instance by executive organs. In all cases, they will, of course, examine, by certiorari or otherwise, whether a given administrative act has been legal in character, that is, whether the agent performing it has had the necessary official power, or whether "due process of law" has been provided. In addition, they have been willing, where specific legislative authority has been granted them, to review administrative determinations of fact, when such determinations have required the exercise of functions essentially judicial in character.<sup>11</sup>

### **Judicial powers of administrative agents**

From what has gone before it will have been seen that though the courts will not perform administrative acts, there is no constitutional objection to vesting the performance of acts essentially judicial in character in the hands of the executive or administrative agents, provided the performance of these functions is properly incidental to the execution by the department in question of functions peculiarly its own. Furthermore, as we shall later see, there is, subject to the same qualification, no objection to rendering the administrative determinations conclusive, that is, without an appeal to the courts, provided in general the requirements of due process of law as regards the right of the person affected to a hearing, to produce evidence, etc., have been met.

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<sup>11</sup> *United States v. Butterworth*, 112 U. S. 50; 5 Sup. Ct. Rep. 25; 28 L. ed. 656; *United States v. Duell*, 172 U. S. 576; 19 Sup. Ct. Rep. 286; 43 L. ed. 559; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; 14 Sup. Ct. Rep. 1125; 38 L. ed. 1047.

## CHAPTER LIV

### CONCLUSIVENESS OF ADMINISTRATIVE DETERMINATIONS

#### **Due process of law does not demand determination of rights in courts of law**

Due process of law does not require that personal and property rights shall in all cases be finally determined in courts of law.<sup>1</sup> As has been more fully shown in the chapter entitled "Due Process of Law," the prohibition imposed by the Constitution upon both the national and State governments that life, liberty or property shall not be taken without "due process of law," means not so much that a specific mode of procedure shall be followed, as that in that procedure certain fundamental principles looking to the protection of the individual against oppression and injustice shall be observed. In accordance with this interpretation it has been held that the determination of facts upon which a given right of life, liberty or property may depend, need not necessarily be placed in the hands of the courts, but may be conclusively determined by executive agents. In *Murray's Lessee v. Hoboken Land and Improvement Company* above cited, it was held that Congress might endow an administrative officer with the power to determine the amount due from a government officer, and to enforce its collection, without the intervention of the courts, by a distress warrant

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<sup>1</sup> *Murray v. Hoboken Land & Improvement Co.*, 18 How. 272; 15 L. ed. 372.

issued by the Solicitor for the Treasury. In *Springer v. United States* <sup>2</sup> a similar authority was granted the executive arm for the collection of a tax from a private citizen, the court saying: "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable. If the laws here in question involve any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

The same finality that has been conceded to administrative determinations has been predicated of the decisions of tribunals established under the treaty-making power.<sup>3</sup>

It will be noted that in several of the foregoing cases the practical requirements of efficient government furnish the basis of argument. This same justification is even more emphasized in later cases, and, with the continuing increase in number and complexity of governmental functions, we may confidently expect that the courts will strengthen the hands of the administration whenever possible. It is not to be expected, however, that the judiciary will ever resign the right to determine whether the facts administratively determined are such as fall within the field of judgment granted to the administrative agents of the law, or whether, admitting the facts to be so determined, they furnish the authority for the executive acts predicated upon them.<sup>4</sup>

In a series of cases, the court has conceded to customs

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<sup>2</sup> 102 U. S. 586; 26 L. ed. 253.

<sup>3</sup> *Comegys v. Vasse*, 1 Pet. 193; 7 L. ed. 108; *Terlinden v. Ames*, 184 U. S. 270; 22 Sup. Ct. Rep. 484; 46 L. ed. 534.

<sup>4</sup> *Smelting Co. v. Kemp*, 104 U. S. 636; 26 L. ed. 875.

officers final and conclusive authority in the matter of appraisement and classification of imports.<sup>5</sup>

### Fraud orders

In *Public Clearing House v. Coyne*<sup>6</sup> was sustained the constitutionality of a congressional delegation of authority to the Postmaster-General to determine, without the aid of the courts, whether the mail of a given concern should be excluded from the mails, because fraudulent or partaking of the nature of a lottery.

Though the judgment of the Postmaster-General, as granted him by statute, has thus been held to be final and conclusive with reference to the issuance of fraud orders, the Supreme Court held in *American School of Magnetic Healing v. McAnnulty*<sup>7</sup> that the law required that this judgment should be one founded on facts ascertained by evidence, and that it might not be simply the Postmaster-General's personal judgment as to the fraudulent character of the business whose mail is to be excluded.

### Chinese exclusion cases

In the various Chinese exclusion cases the same principles as those already laid down have been applied. Inasmuch, however, as their application has involved questions of personal liberty rather than property, their adoption by the courts has seemed to some oppressive, and in the *Ju Toy* case,<sup>8</sup> decided in 1905, earnest dissenting opinions are filed. In *Chae Chan Ping v. United States*<sup>9</sup> the court

<sup>5</sup> *Hilton v. Merritt*, 110 U. S. 97; 3 Sup. Ct. Rep. 548; 28 L. ed. 83; *Buttfield v. Stranahan*, 192 U. S. 470; 24 Sup. Ct. Rep. 349; 48 L. ed. 525.

<sup>6</sup> 194 U. S. 497; 24 Sup. Ct. Rep. 789; 48 L. ed. 1092.

<sup>7</sup> 187 U. S. 94; 23 Sup. Ct. Rep. 33; 47 L. ed. 90.

<sup>8</sup> *United States v. Ju Toy*, 198 U. S. 253; 25 Sup. Ct. Rep. 644; 49 L. ed. 1040.

<sup>9</sup> 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068.

held valid the Act of 1888 prohibiting Chinese laborers from entering the United States who had departed before its passage, without certificates issued under the Act of 1882 as amended by the Act of 1884 granting them permission to return. This the court did, even though it recognized that the Act of 1888 was in contravention of express stipulations of the Treaties of 1868 and 1880 between the United States and China. In *Fong Yue Ting v. United States*<sup>10</sup> the doctrine was again declared that the provisions of an act of Congress passed in the exercise of its constitutional authority must be upheld by the courts, even though in contravention of an earlier treaty. The power to exclude or expel aliens is held to be vested in the political departments of the government, and to be executed by the executive authority except so far as the judicial department has been authorized by treaty or statute to intervene, or where some provision of the Constitution has been violated. Having this right, the executive department, it was held, might be authorized to provide a system of registration and identification of Chinese laborers, and to require them to obtain certificates of residence, and to provide for the deportation of those not so obtaining certificates within a year. The provision of the act that the executive officer acting in behalf of the United States should bring the Chinese laborer before a Federal court in order that he might be heard and the facts upon which depended his right to remain in the country decided, was held valid, the duty so imposed upon the court being declared judicial in character.

In *Ekiu v. United States*<sup>11</sup> it was held that in reaching the determination whether an alien is lawfully entitled to enter the country, it is not necessary for the administration to take testimony. The court, however, say: "An

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<sup>10</sup> 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905.

<sup>11</sup> 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146.

alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."

### Ju Toy case

In *United States v. Sing Tuck*,<sup>12</sup> the contention was made that the question, whether or not a person seeking admission was an alien, necessarily involved the authority of the immigration officials to act at all, and that this jurisdictional question was one which the courts could not refuse to pass upon. In this case the Supreme Court avoided passing upon the point *in limine*, holding that the petitioner could not seek judicial remedy until he had exhausted (as he had not) the administrative remedies given him by statute. In *United States v. Ju Toy*,<sup>13</sup> however, the petitioner had carried his appeal to the highest administrative official authorized by statute to consider his claim, and the Supreme Court thereupon found itself obliged to pass upon the main contention, which it did, holding that the administrative decision as to the status of the petitioner, no abuse of authority being *prima facie* made out, was final and conclusive.

Of course, if the question of alienage or citizenship is dependent upon a matter of law, and not a determination purely of fact, the matter will be reviewed by the courts. Thus, for example, in *Gonzales v. Williams*<sup>14</sup> the court determined in the last instance whether or not a native of Porto Rico who was an inhabitant of the island at the time of cession to the United States was upon her arrival at a port of this country to be treated as an alien im-

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<sup>12</sup> 194 U. S. 161; 24 Sup. Ct. Rep. 621; 48 L. ed. 917.

<sup>13</sup> 198 U. S. 253; 25 Sup. Ct. Rep. 644; 49 L. ed. 1040.

<sup>14</sup> 192 U. S. 1; 24 Sup. Ct. Rep. 171; 48 L. ed. 317.

migrant within the meaning of the Act of Congress of 1891.

### **Constitutional requirements of administrative determinations**

The series of cases, culminating in that of *United States v. Ju Toy*, considered in the preceding paragraphs, are to be construed as determining simply that when, by statute, the conclusive determination of facts has been vested in administrative agents, a judicial review thereof may not be demanded as a constitutional right. In two respects, however, such administrative acts are, and constitutionally must be, reviewable in the courts. In the first place, as has already been pointed out, the question of the jurisdiction of the administrative agents or bodies to act is always open to judicial examination. In the second place it is always open to the courts to determine whether, in the administrative procedure which has been followed, the essential procedural requirements of due process of law have been present. As said by the court in *Yamataya v. Fisher*,<sup>15</sup> the court "must not be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

In this case it was held that due process was satisfied by an informal notice to the plaintiff that an investigation was to be had to determine whether she should be deported, although it was alleged that, because of her lack of knowledge of the English language, she did not understand the import of the questions propounded to her, and that, in fact, she did not know that these questions related to the matter of her possible deportation.

Where, from the nature of the case, the determination

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<sup>15</sup> 189 U. S. 86; 23 Sup. Ct. Rep. 611; 47 L. ed. 721.

of the fact at issue, is, for example, the ascertainment of the character of a commodity, which character may be ascertained by comparing it with an established standard, it has been held that a hearing is not needed. And in *Ekiu v. United States*, earlier referred to, the statute was held not to require inspectors to take testimony, but that they might decide upon their own inspection, whether an alien immigrant was entitled to enter the country. It was, however, declared that upon habeas corpus the question could be determined by the courts whether one prevented from landing had had an opportunity to ascertain whether his detention was lawful.<sup>16</sup>

### **Arbitrary administrative discretion**

Generally speaking, it may be said that while wide discretionary power may constitutionally be granted to administrative agents, that discretion must be one which is guided by reason, justice, and impartiality, and exercised in the execution of policies predetermined by legislative act, or fixed by the common law.

In *Yick Wo v. Hopkins*<sup>17</sup> the court laid down the doctrine that the legislative investment of purely personal and arbitrary power in the hands of any public official is a denial of due process of law. "The very idea," say the court, "that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Taken by itself the language of the court, as will be seen from the quotation which has been made, indicates that in no case may an arbitrary discretionary power be

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<sup>16</sup> *Cf. Chin Low v. United States*, 208 U. S. 8; 28 Sup. Ct. Rep. 201; 52 L. ed. 369.

<sup>17</sup> 118 U. S. 356; 6 Sup. Ct. Rep. 1064; 30 L. ed. 220.



granted to a public official which will compel any person "to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another." The force of this holding, is, however, somewhat weakened by the fact that the court found that, whatever the terms or intent of the ordinances in question, they had actually been administered in a grossly partial and unjust manner. And also, and more importantly, in the later case of *Wilson v. Eureka City*<sup>18</sup> the court expressly upheld the constitutionality of an ordinance committing the right of the plaintiff with reference to the removal of a building owned by him, to the unrestrained discretion of a single official. The summary of cases in the State courts, given by the court in *Re Flaherty*,<sup>19</sup> in which unrestrained discretion is sustained, is quoted with approval, the court declaring the discretionary power to be "based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error."

In this case it is certain that the Supreme Court commits itself to the doctrine that administrative officials may, in certain cases at least, be given a discretionary power to act according to their own unrestricted judgment as to what the circumstances require, and that, therefore, an ordinance or a law purporting to grant this authority is not, upon its face, void.

It may be predicted, however, that the grant of such arbitrary power will not be upheld except in those cases in which comparatively unimportant private interests are involved, or where the requirements of administrative effi-

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<sup>18</sup> 173 U. S. 32; 19 Sup. Ct. Rep. 317; 43 L. ed. 603.

<sup>19</sup> 105 Calif. 558. See also *Davis v. Massachusetts*, 167 U. S. 43; 17 Sup. Ct. Rep. 731; 42 L. ed. 71.

ciency demand the existence of such an authority. And, furthermore, the doctrine of *Yick Wo v. Hopkins* will of course apply in those cases in which it is clearly shown that in fact the discretionary power which has been granted has been abused and oppressively or unfairly exercised.

In *American School of Magnetic Healing v. McAnnulty*,<sup>20</sup> a fraud order of the Postmaster-General was held not authorized by the statute under which the right to issue the order was claimed, the court holding that the law did not grant to the Postmaster-General a power to issue fraud orders except in cases where there was evidence, that is, something more than the individual opinion of the Postmaster-General, to show that the business against which the orders might be issued is a fraudulent one. The statutory power of Congress, should it see fit to exercise it, to vest in the Postmaster-General a general power to exclude from the use of the mails those concerns which in his judgment he might deem to be fraudulent was thus not involved or passed upon.

### **Mandamus**

In an earlier chapter of this treatise it has been pointed out that the courts will not by mandamus or other writ attempt to control the exercise by administrative or executive agents of a discretion given them by the Constitution or statutes. This, as we have seen, excludes from the field of judicial review all those acts which, as political in character, are purely discretionary. It also excludes an attempt upon the part of the courts to control all other administrative and executive acts in so far as there is possessed by those officials intrusted with their performance, a discretion as to whether the acts shall be performed at all. Where, however, an act, not purely politi-

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<sup>20</sup> 187 U. S. 94; 23 Sup. Ct. Rep. 33; 47 L. ed. 90.

cal in character, is by law required of an officer, the performance of which involves the exercise of a discretion, the courts may require that the discretion be exercised and the act performed. Furthermore, whether or not an officer has overstepped the limits of the discretionary powers granted him is always a proper subject for judicial determination, though not by mandamus.

That a mandamus will lie to compel the performance of purely ministerial acts, that is, acts not involving the exercise of political or administrative discretion, is a principle that antedates the adoption of the United States Constitution.<sup>21</sup>

The courts will not interfere by mandamus with executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law. The writ of mandamus, in other words, is not to be used as a writ of error in place of an appeal. If there has been a misinterpretation of the law by the executive officer, the court, if it has been given jurisdiction, will correct it on appeal, or the person who believes himself injured may institute appropriate civil or criminal proceedings.<sup>22</sup>

When a subordinate administrative officer is overruled by his superior who has an appellate administrative jurisdiction over him, his duty to obey is a ministerial one and may be compelled by mandamus.<sup>23</sup> The Federal court must, however, have been granted, by statute, the authority to issue the mandamus and, in fact, no such general authority has been granted by Congress to the Federal

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<sup>21</sup> *Marbury v. Madison*, 1 Cr. 137; 2 L. ed. 60.

<sup>22</sup> *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; 23 Sup. Ct. Rep. 698; 47 L. ed. 1074; *Bates & Guild Co. v. Payne*, 194 U. S. 106; 24 Sup. Ct. Rep. 595; 48 L. ed. 894.

<sup>23</sup> *United States v. Miller*, 128 U. S. 40; 9 Sup. Ct. Rep. 12; 32 L. ed. 354.

courts. It has, however, been held, that the courts of the District of Columbia, having been granted general common-law powers, possess the authority.<sup>24</sup>

### **The amenability of the President to compulsory judicial process**

From the foregoing it has appeared that, for the performance of a purely ministerial act, a mandamus will lie to the heads of the great departments of the Federal Government, and, *a fortiori*, to their subordinates. We have now to inquire whether the President, the chief executive of the nation, is, with reference to the performance of a purely ministerial act, similarly subject to compulsory judicial process. This question has several times been before the courts, and though not often passed upon *in limine*, has been uniformly answered in the negative.

As was intimated in *Marbury v. Madison*,<sup>25</sup> a chief of one of the executive departments, when acting under the direct orders of the President, with reference to a matter which has, by the Constitution, been placed within the discretionary or political control of the President, is not amenable to the authority of the courts.

### **Obligation of the President to enforce laws believed by him to be unconstitutional**

That the President has the right to veto an act of Congress because he believes it to be an unconstitutional measure, even though he thus substitutes his judgment as to this for that of Congress, is beyond doubt. The objection that has sometimes been made that in so doing

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<sup>24</sup> *Kendall v. United States*, 12 Pet. 524; 9 L. ed. 1181.

<sup>25</sup> 1 Cr. 137; 2 L. ed. 60. See, also, *Burr's Trial*, *passim*; *Mississippi v. Johnson*, 4 Wall. 475; 18 L. ed. 437; *Georgia v. Stanton*, 6 Wall. 50; 18 L. ed. 721.

the President arrogates to himself a judicial function is without weight.

In placing a veto upon a congressional enactment, the President is exercising, not a judicial, but a legislative function. His veto is of the nature of a powerful vote, and his decision as to the way his vote is to be cast must be based upon his own views and opinions. The Constitution gives him the power and he has the right to use it; indeed, it is his duty to use it. He has the right to use his veto upon the ground of unconstitutionality even when a measure of similar character has received previous interpretation by the Supreme Court, and has been sustained. His constitutional right or even duty of thus using his veto power has not been impaired by the manner in which any previous act has been treated. In 1832 Jackson vetoed the bill providing for a recharter of the National Bank. This he did mainly on the ground of its unconstitutionality, notwithstanding the fact that in the case of *McCulloch v. Maryland* this institution had been carefully examined by the Supreme Court and pronounced constitutional.

Whether the President has the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional, is an entirely different question from that just considered. Here the President has to deal not with a measure in the process of enactment, as is the case when the veto is exercised, but with a bill that has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure. The President has not been given the power to defeat the will of the people or of the legislature as embodied in law.

That the President and all other officers of the government have not the right to refuse obedience to a judgment of the Supreme Court, because he or they believe such

judgment to be based upon an incorrect interpretation of the Constitution, scarcely needs argument. This case is stronger than the former one by reason of the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions.

### **Liability of the State for the acts of its officers**

The doctrine of the non-suability of the State prevents the prosecution of a claim against the United States, or a State of the Union, whether that claim be founded upon a tort of one of its agents, or be one arising out of a contract.<sup>26</sup>

### **Legal liability of public officials to private individuals injured by their acts—*ultra vires* acts**

As has elsewhere been shown in this treatise, a fundamental principle of American law is that the legality of acts of public officers is determined in the ordinary courts according to the same rules that govern the decision of suits between private individuals. Thus, generally speaking, no officer can defend an *ultra vires* or otherwise illegal act by setting up his official position or exhibiting the command of a political superior. This last statement as to the non-applicability of the principle of *respondeat superior* is, however, subject to this qualification, that the order of an administrative superior, *prima facie* legal, though in fact not legal, may be set up in defense of an act commanded by military superiors.<sup>27</sup>

The result of the doctrine last stated is, as will be seen, that an act is defended for the performance of which in fact no legal authority can be produced. Simply the color

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<sup>26</sup> *Dooley v. United States*, 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074, and authorities there cited.

<sup>27</sup> *In re Fair*, 100 Fed. Rep. 149.

of authority on the part of the superior giving the command is held a sufficient defense. Clearly common justice, and the practical necessities of administration justify the rule, yet, inasmuch as it does in fact protect an act essentially illegal, the doctrine is one that is kept within the narrowest possible bounds. Only where there is present no fact which would put the subordinate, as a man of ordinary intelligence, upon his guard, or where the practical necessities of the case leave little or no opportunity for individual judgment in the matter, should the rule be applied. In all other cases, it is to be repeated, the public official is able to defend his act only by showing some existing legal authority for it.

The necessities of the case require the foregoing doctrine, with reference to the military arm of the government. There not being the same urgency for immediate obedience the doctrine does not prevail in civil matters.<sup>28</sup>

#### **Responsibility of officers for improper exercise of authority—malice, etc.**

Thus far we have been considering the criminal and civil responsibility of public officers for *ultra vires* and otherwise illegal acts. We have now to consider their responsibility to private individuals for acts committed by them within the general scope of their respective authorities, but characterized by undue severity, discrimination, or malice.

In general no officer is held responsible in damages to an individual for non-performance or negligent performance of duties of a purely public or political character.

“In order to be made the basis of a claim for damages, the duty, the neglect of which has caused the damage, must be one which the individual suffering the damage

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<sup>28</sup> *Hendricks v. Gonzales*, 67 Fed. Rep. 351.

has the right, not as a part of the public, but as an individual to have performed.”<sup>29</sup>

So long as public officers act within the general sphere of their authority, their legal responsibility to private individuals for the manner in which they act, whether their acts be dictated by malice, or characterized by negligence, is very slight.

### **Responsibility of judges of courts of superior or general jurisdiction**

That judges of courts of superior or general jurisdiction are not civilly liable for judicial acts, even though maliciously or corruptly done, has already been indicated, the cases in point being reviewed by the court in *Spalding v. Vilas*.<sup>30</sup> This is true even when the acts done are in excess of their jurisdiction, provided it appear that this want of jurisdiction is not clear and unmistakable. Where however, authority is clearly usurped, action will lie.<sup>31</sup>

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<sup>29</sup> Goodnow, *American Administrative Law*, 402; *Spalding v. Vilas*, 161 U. S. 483; 16 Sup. Ct. Rep. 631; 40 L. ed. 780; *Kendall v. Stokes*, 3 How. 87; 11 L. ed. 506.

<sup>30</sup> 161 U. S. 483; 16 Sup. Ct. Rep. 631; 40 L. ed. 780.

<sup>31</sup> *Bradley v. Fisher*, 13 Wall. 335; 20 L. ed. 646.



## CHAPTER LV

### THE DELEGATION OF LEGISLATIVE POWER

#### **Delegated power may not be delegated**

“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by that constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.”<sup>1</sup>

The principle as thus absolutely stated is subject to one important exception, and to several qualifications, or at least explanations.

#### **Local governing powers may be delegated**

The exception is with reference to the delegation of powers to local governments. The courts have held, as to this, that the giving by the central legislative body of extensive law-making powers with reference to local matters to subordinate governing bodies being an Anglo-

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<sup>1</sup> Cooley, *Constitutional Limitations*, 7th ed., 163.

Saxon practice, antedating the adoption of the Constitution, and the right of local self-government being fundamental to our system of politics, our Constitutions are, in the absence of any express prohibitions to the contrary, to be construed as permitting it.

**Power to issue administrative ordinances may be delegated**

The qualifications to the rule prohibiting the delegation of legislative power are those which provide that while the real law-making power may not be delegated, a discretionary authority may be granted to executive and administrative authorities: (1) To determine when and how the powers conferred are to be exercised; and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met, and the rights therein created to be enjoyed.

The principle which permits the legislature to provide that the administrative agents may determine when the circumstances are such as require the application of a law is defended upon the ground that at the time this authority is granted, the rule of public policy, which is the essence of the legislative act, is determined by the legislature. In other words, the legislature, as it is its duty to do, determines that, under given circumstances, certain executive or administrative action is to be taken, and that under other circumstances, different or no action at all is to be taken. What is thus left to the administrative official is not the legislative determination of what public policy demands, but simply the ascertainment of what the facts of the case require to be done according to the terms of the law as legislatively declared.

The doctrine thus declared is without objection so long as the facts which are to determine the executive acts are

such as may be precisely stated by the legislature and certainly ascertained by the executive. When this is not so the officer entrusted with the execution of the law is necessarily vested with an independent judgment as to when and how the law shall be executed; and when this independence of judgment is considerable there is ground for holding that the law is not simply one *in presenti* to take effect *in futuro*, but is a delegation by the law-making body of its legislative discretion.<sup>2</sup>

The question when an administrative discretion is so broad as to amount to a legislative power is not one that may be solved according to any fixed formula, but one that has to be answered in each individual case according to the judgment of the court.<sup>3</sup>

### Delegation of rate-making powers

That the fixing of the rates or charges that may be collected by public service corporations for the services rendered by them is, primarily at least, a legislative function, is so well established that the citation of authorities is scarcely necessary.<sup>4</sup> Indeed, it was originally held in *Munn v. Illinois* <sup>5</sup> that this power was so exclusively legislative that the validity of laws in regulation of businesses affected with a public interest could not be questioned by the courts under the due process of law clauses of the Constitution.

In the States the delegation by the legislative body to

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<sup>2</sup> The leading case is *Field v. Clark*, 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

<sup>3</sup> See *Buttfield v. Stranahan*, 192 U. S. 470; 24 Sup. Ct. Rep. 349; 48 L. ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 364; 27 Sup. Ct. Rep. 367; 51 L. ed. 523; *St. L., I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. ed. 1061.

<sup>4</sup> For citation of cases see *Atlantic C. L. R. Co. v. N. Carolina Corp. Com.*, 206 U. S. 1; 27 Sup. Ct. Rep. 585; 51 L. ed. 933.

<sup>5</sup> 94 U. S. 113; 24 L. ed. 77.

commissions or other boards of authority to fix rates has been generally sustained where by law general principles have been established for the guidance and control of these administrative bodies in the exercise, in specific instances, of their rate-making powers.

In a number of instances these laws have come before the Supreme Court of the United States, but not in such a way as to compel the court to pronounce squarely upon their constitutionality as tested by the principle that legislative power may not be delegated by the law-making body to an administrative board or commission, for this is a question of State constitutional law with which the Federal courts have no concern. It is only when the allegation is made that when the rates as fixed, whether directly by the legislature or by another authority, are confiscatory, and, therefore, operate to deprive either the railway or the shipper of property without due process of law, that a Federal question is raised.

That a considerable amount of regulative control over railways may constitutionally be delegated to the Interstate Commerce Commission has not been disputed. It was not until the act of 1906, however, that that body was intrusted by Congress with the authority to fix in specific instances the rates that interstate railways might charge. By that law it is provided that the rates which these companies may legally fix, or which may be fixed for them by the Commission, must be "just and reasonable." This is, practically, the only principle legislatively laid down for the guidance and control of the Commission. The constitutionality of this feature of the law has, however, not been questioned by the Supreme Court.<sup>6</sup>

### **The referendum as a delegation of legislative power**

As to whether the so-called "referendum" employed

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<sup>6</sup> *Int. Com. Com. v. N. P. R. Co.*, 216 U. S. 538; 30 Sup. Ct. Rep.

in some of the States is an unconstitutional delegation by the legislature of law-making powers to the people, there is a conflict of authorities. The weight of authority would, however, seem to be against the validity, apart from express constitutional authorization, of the submission to the electorate of the entire State of the question whether a measure shall or shall not become a law.

### **Administrative ordinances**

The authority that administrative agents may constitutionally exercise in the promulgation of rules and ordinances regulating in detail the execution of the laws the enforcement of which has been placed in their hands, and the legal force to be given to those rules thus administratively established, is a subject that has given rise to many adjudications. These rules, it is to be observed, fall into two general classes. First, those established by an administrative superior and directed solely to the administrative inferior; secondly, those binding of course the administrative inferiors, but primarily directed to the private citizen, and fixing the manner in which the requirements of the statute are to be met by him. This second class of rules is, in turn, divisible into two classes; those to which a criminal penalty is attached for their violation, and those merely defining the manner in which rights created by the statute are to be enjoyed.

The first of these two main classes of administrative ordinances differ from those of the second class in that though valid as between the administrative superior and his inferior, they do not create legal rights which may be enforced in the courts. Of this class, for example, are certain of the civil service regulations which the Presidents of the United States have issued under authority of

the Civil Service Acts, fixing the classes to be included in the "classified service," providing for examinations for admission to the service, and declaring the conditions under which promotions and removals may be made.

As to those rules or ordinances, established by executive agents, providing the modes under which private persons may receive the privileges granted by law or be held responsible for violations of the duties imposed therein, it may in general be said that the executive may establish all special regulations that fall within the general field of the authority granted by law, and which are reasonably calculated to secure the execution of the legislative will as laid down in the statutes.

With reference to many of the Army and Navy Regulations issued by the President it is to be observed that these derive their force not from congressional authorization, but directly from the constitutional power of the President as Commander-in-Chief of the army and navy; and this, too, notwithstanding the constitutional provision that Congress may make rules for the government and regulation of the land and naval forces.<sup>7</sup>

An administrative officer in the execution of his duties may not change the express provisions of the law, even though these provisions no longer seem the best adapted to secure the end desired by Congress.<sup>8</sup>

### **Penal ordinances**

The courts scrutinize with especial care those cases in which a criminal action is based upon a violation of an administrative order. It is not questioned that the legislature may attach a criminal liability to the violation of an administrative order, but in each case it must clearly

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<sup>7</sup> *United States v. Eliason*, 16 Pet. 291; 10 L. ed. 968.

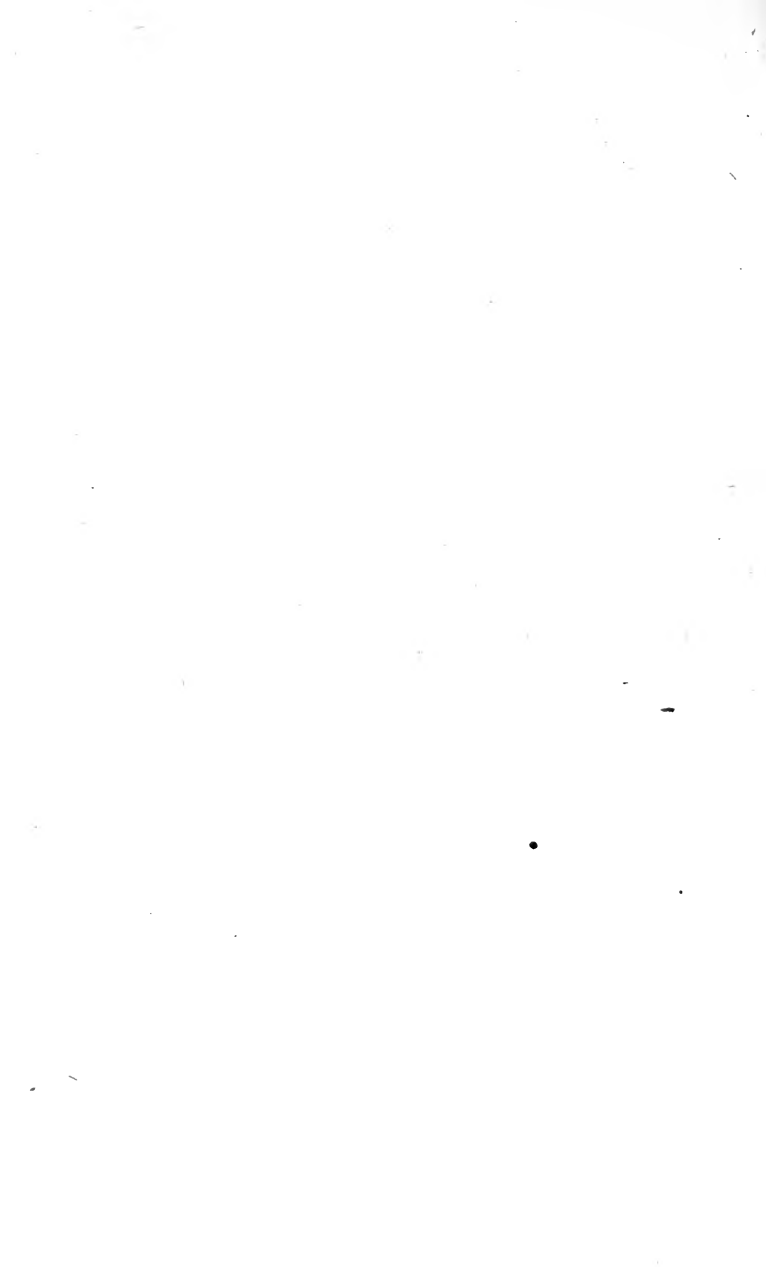
<sup>8</sup> *Merritt v. Welsh*, 104 U. S. 694; 26 L. ed. 896; *Morrill v. Jones*, 106 U. S. 466; 1 Sup. Ct. Rep. 423; 27 L. ed. 267.

appear that the order is one which falls within the scope of the authority conferred. Thus, while there are many cases in which it has been held that the delegation of an ordinance-making power to the executive is not a delegation of legislative power, there are comparatively few cases in which has been sustained the right of an administrative officer to establish an ordinance the violation of which will be punished criminally.<sup>9</sup>

By the Railway Rate Law of 1906 the Interstate Commerce Commission is authorized to issue various orders with reference to the conduct of their business by interstate carriers, and provision is made that violation of these orders shall be punishable by fines and forfeitures which may be recovered in civil suits in the name of the United States.

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<sup>9</sup> *United States v. Maid*, 116 Fed. Rep. 650; *United States v. Eaton*, 144 U. S. 677; 12 Sup. Ct. Rep. 764; 36 L. ed. 591; *United States v. Bailey*, 9 Pet. 238; 9 L. ed. 113; *Ex parte Kollock*, 165 U. S. 526; 17 Sup. Ct. Rep. 444; 41 L. ed. 813.





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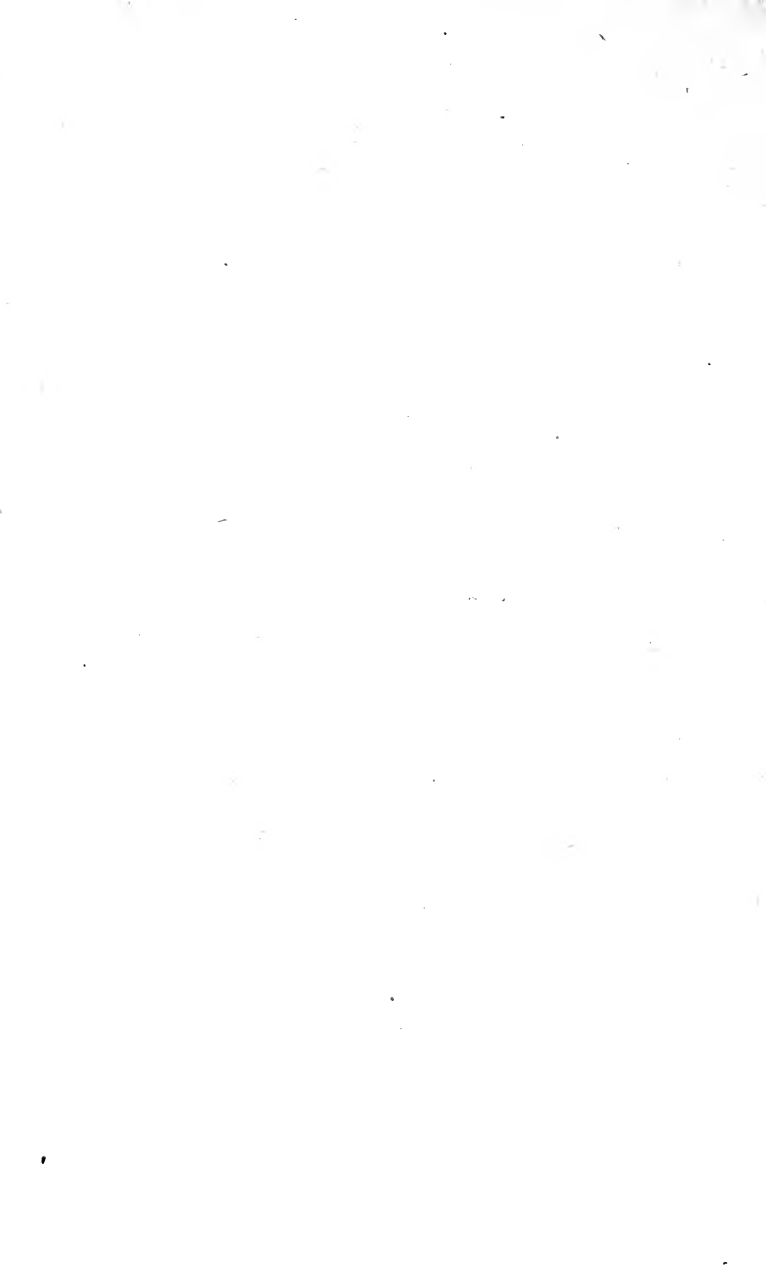
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# APPENDIX





# ARTICLES OF CONFEDERATION

## ARTICLE I

The style of this confederacy shall be, "The United States of America."

## ARTICLE II

Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

## ARTICLE III

The said States hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

## ARTICLE IV

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State, of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor, or executive power, of the State from which he fled,

be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

## ARTICLE V

For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the Legislature of each State shall direct, to meet in Congress on the first Monday in November in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emoluments of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from and attendance on Congress, except for treason, felony, or breach of the peace.

## ARTICLE VI

No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind

whatever, from any king, prince, or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such State or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide, and have constantly ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or State, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

## ARTICLE VII

When land forces are raised by any State for the common defense, all officers of, or under, the rank of colonel shall be appointed by the Legislature of each State, respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

## ARTICLE VIII

All charges of war, and all other expenses that shall be incurred for the common defense, or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State granted to, or surveyed, for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislature of the several States, within the time agreed upon by the United States, in Congress assembled.

## ARTICLE IX

The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting exportation or importation of any species of goods, or commodities, whatsoever—of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in

times of peace—appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort, on appeal, in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: whenever the legislative or executive authority, or lawful agent, of any State in controversy with another shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties, by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed; shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall, nevertheless, proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being, in either case, transmitted

to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward": provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement or jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade, and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government, and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general

affairs of the United States under their direction—to appoint one of their number to preside; provided that no person be allowed to serve in the office of president more than one year in any term of three years—to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them, in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the Legislature of such State shall judge that such extra number can not safely be spared out of the same; in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the

same; nor shall a question on any other point, except for adjourning from day to day, be determined unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as, in their judgment, require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

#### ARTICLE X

The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

#### ARTICLE XI

Canada, acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to, all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

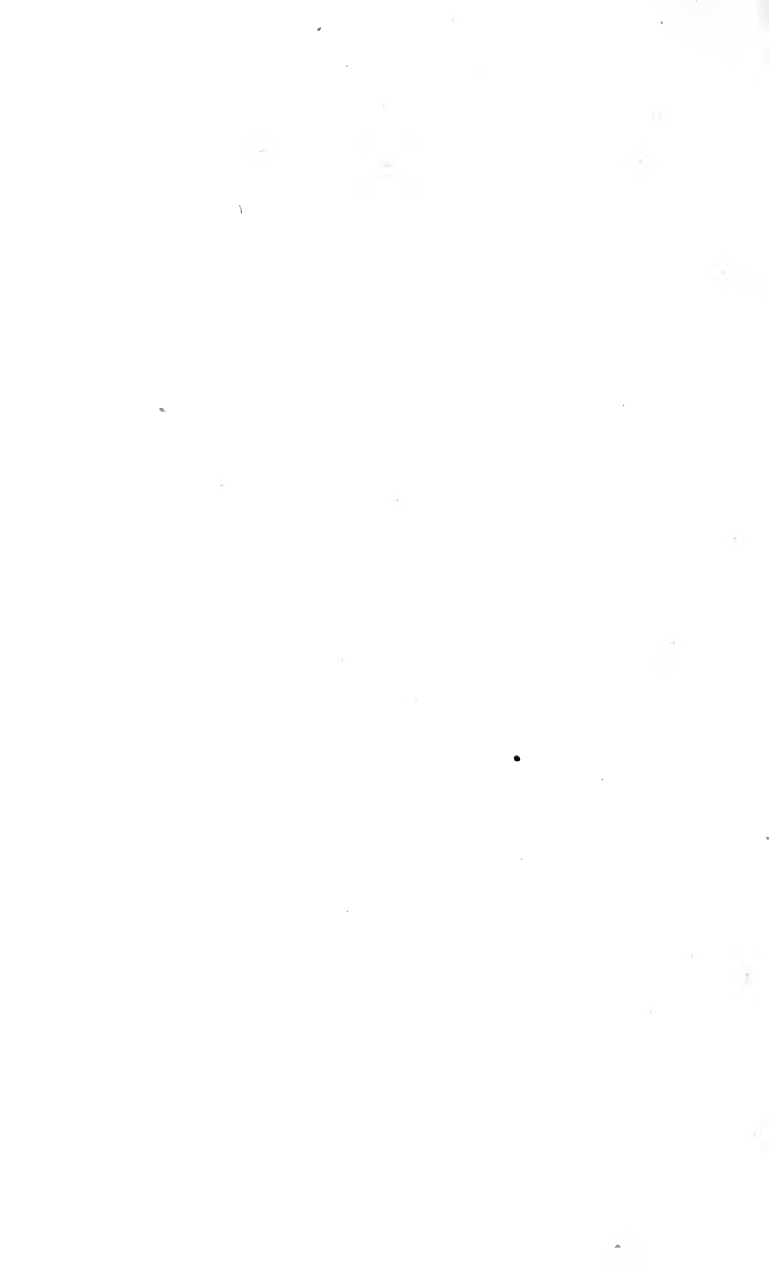
#### ARTICLE XII

All bills of credit emitted, moneys borrowed, and debts contracted, by or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.



## ARTICLE XIII

Every State shall abide by the decision of the United States, in Congress assembled, on all questions which, by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterward confirmed by the Legislature of every State.



# CONSTITUTION OF THE UNITED STATES

## PREAMBLE

WE, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE I

### LEGISLATIVE DEPARTMENT

#### Section 1. Division into Two Houses

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

#### Section 2. House of Representatives

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose *three*; Massachusetts, *eight*; Rhode Island and Providence Plantations, *one*; Connecticut, *five*; New York, *six*; New Jersey, *four*; Pennsylvania, *eight*; Delaware, *one*; Maryland, *six*; Virginia, *ten*; North Carolina, *five*; South Carolina, *five*, and Georgia, *three*.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

## Section 3. Senate

1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution. (Effective May 31, 1913.)

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; and of the third class at the expiration of the sixth year; so that one third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments, until the next meeting of the Legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments; when sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief-Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but

the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law.

#### **Section 4. Elections and Meetings of Congress**

1. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

#### **Section 5. Powers and Duties of the Houses**

1. Each House shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

#### **Section 6. Privileges of and Prohibitions upon Members**

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech

or debate in either house, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

### **Section 7. Revenue Bills: President's Veto**

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose, or concur with, amendments, as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But, in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bills shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

## Section 10. Prohibitions upon the States

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II

### EXECUTIVE DEPARTMENT: THE PRESIDENT AND VICE-PRESIDENT

#### Section 1. Term: Election: Qualifications: Salary: Oath of Office

1. ~~The~~ executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

The following clause has been superseded by Article XII. of the Amendments :

3. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed,

to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

4. The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

5. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive, within that period, any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:



"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States; and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

## Section 2. President's Executive Powers

1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the Heads of Departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

## Section 3. President's Executive Powers (continued)

1. He shall from time to time give to the Congress information of the state of the Union; and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

**Section 4. Impeachment**

1. The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

**ARTICLE III****JUDICIAL DEPARTMENT****Section 1. Courts: Terms of Office**

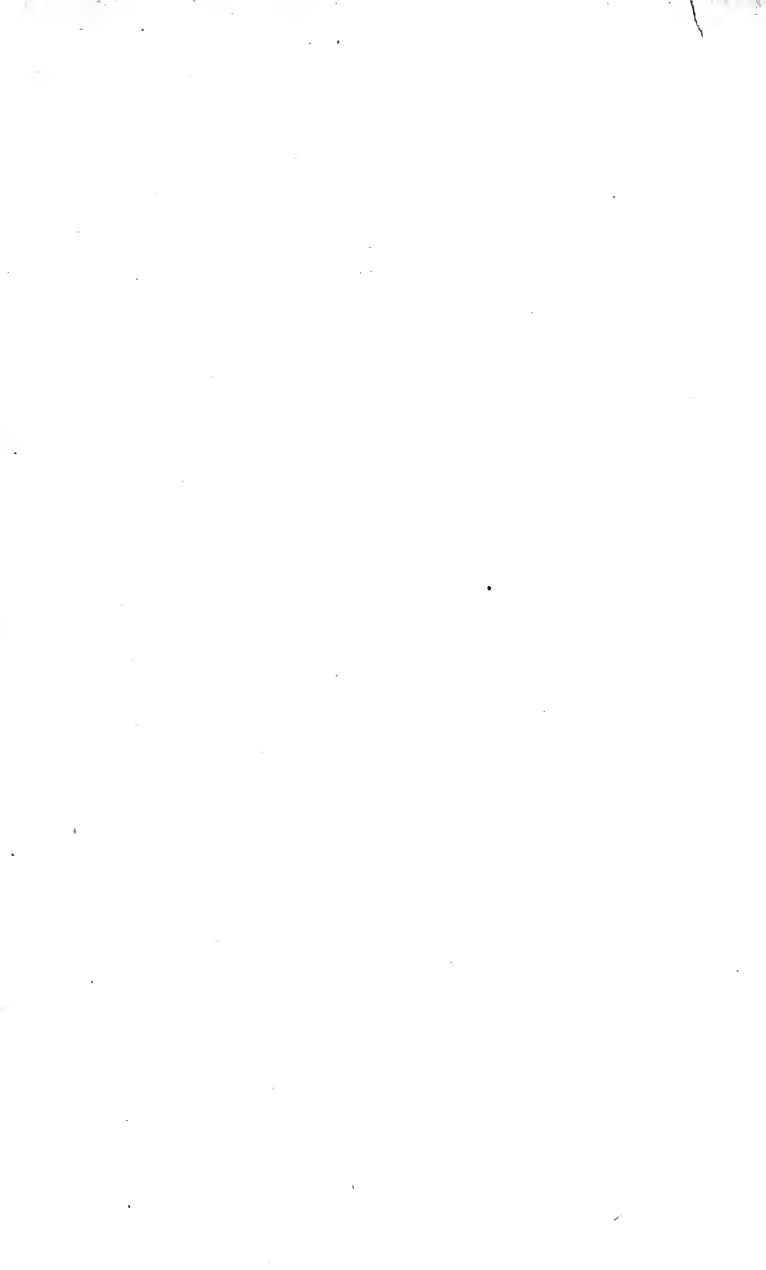
1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish. The judges both of the Supreme and inferior Courts shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

**Section 2. Jurisdiction**

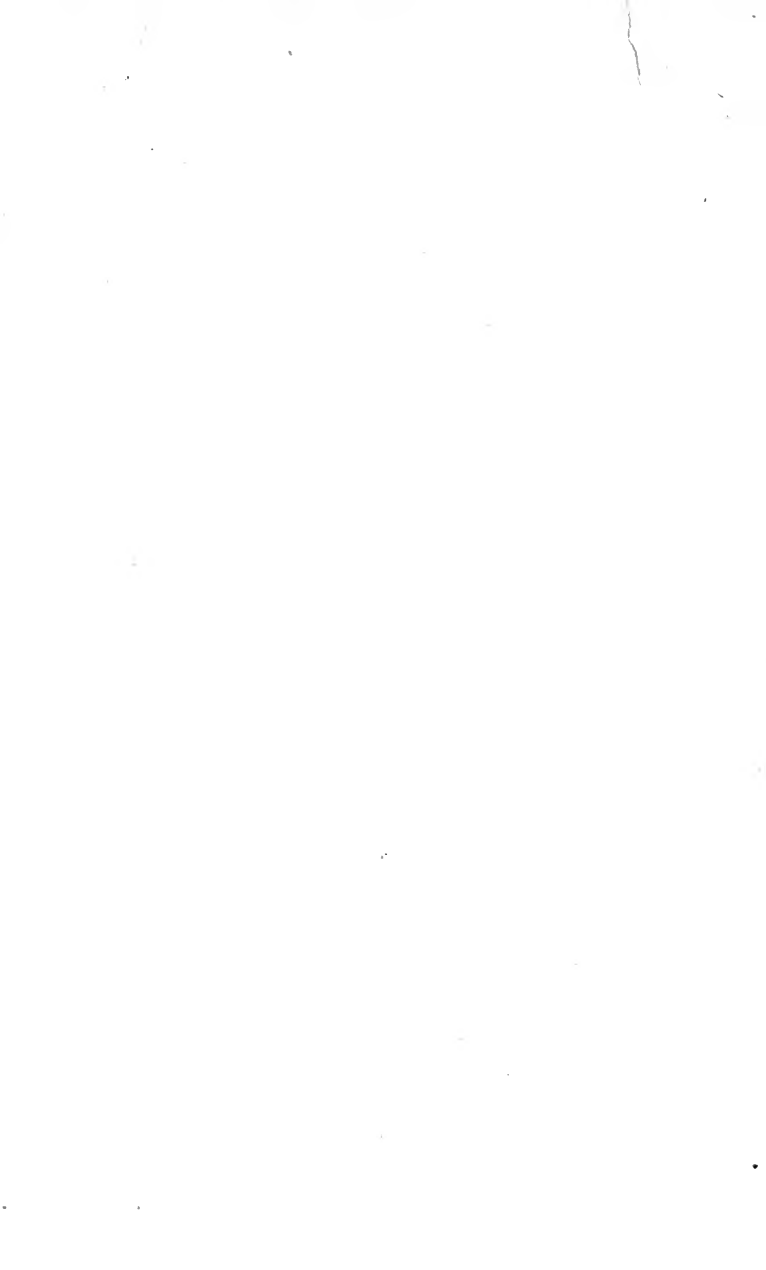
1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.







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